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No. 1

In The
Supreme Court of the United States

JANICE B. LECKEY; JANICE B. LECKEY, Executrix of the Estate of Evelyn O. Knapp, a/k/a Evelyn Olliffe Knapp, Deceased, a/k/a Janice Burger Leckey,
Petitioner,

v.

PAUL W. STEFANO; FRANK W. JONES, Administrators of the Estate of William E. Knapp, Deceased, and Trustees of the Insurance Trust of William Knapp, Deceased,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM R. CAROSELLI
CAROSELLI BEACHLER
McTIERNAN & CONBOY
8TH FLOOR
312 BOULEVARD OF ALLIES
PITTSBURGH, PA 15222
(412) 391-9860

EDWARD C. LECKEY
Counsel of Record
1034 FIFTH AVENUE
3RD FLOOR
PITTSBURGH, PA 15219
(412) 391-9937

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Is the I.R.S. Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-5, contrary to 29 U.S.C. § 1055(b)(1)(C)(iii) and 26 U.S.C. § 401(a)(11)(B)(iii)(III) which make the joint and survivor requirements of 29 U.S.C. § 1055(a)(1) and 26 U.S.C. § 401(a)(11)(A)(i) applicable to a participant in a plan which is a "direct or indirect transferee" of a plan which was subject to the joint and survivor requirements?

2. Did the spouse in this case waive a Joint & Survivor Annuity?

3. Is the I.R.S. Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-5, upon which the Third Circuit relied, directly contrary to the I.R.S. Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-11?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Janice B. Leckey as Surviving Trustee of the American Carbyde Corporation Employees Profit Sharing Retirement Trust and as Executrix of the Estate of Evelyn O. Knapp, a/k/a Evelyn Olliffe Knapp, Deceased, and Paul W. Stefano and Frank W. Jones, as the Court Appointed Administrators of the Estate of William E. Knapp, Deceased, and as the Court Appointed Trustees of the Insurance Trust of William Knapp.

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PETITION FOR A WRIT OF CERTIORARI

Janice B. Leckey, as the Surviving Trustee of the American Carbyde Corporation (AmCarb) Employees Profit Sharing Retirement Trust (Profit Sharing Trust) respectfully Petitions this Court for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit filed August 31, 2007, are officially reported at 501 F.3d 212 (2007) and unofficially reported at 2007 U.S. App. LEXIS 21085 and 2007 WL 2458540. The Judgment is reproduced at Appendix A, pp. 1a-2a, the Opinion is reproduced at Appendix B, pp. 3a-43a and an Order Amending the Opinion is reproduced at Appendix I, pp. 121a-124a.

The Memorandum Order of April 26, 2004, the Findings of Fact and Conclusions of Law dated June 6, 2005, and the Memorandum Order dated March 29, 2006, of the District Court for the Western District of Pennsylvania are not published, but the Memorandum Order dated March 29, 2006, is reproduced at Appendix C, pp. 44a-49a, the Findings of Fact and Conclusions of Law dated June 6, 2005, are reproduced at Appendix D, pp. 50a-75a, and the Memorandum Order of April 26, 2004, is reproduced at Appendix E, pp. 76a-101a.

JURISDICTION

The Judgment of the U.S. Court of Appeals for the Third Circuit was entered August 31, 2007. A timely Petition for Rehearing *en banc* was denied on September 25, 2007, a copy of which Order is reproduced at Appendix F, pp. 102a-103a. This Petition is timely filed pursuant to Supreme Court Rule 13.3, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Statutes involved are 29 U.S.C. § 1055(a)(1), (b)(1), (c)(1), (c)(2)(A) and (c)(3)(A); 26 U.S.C. § 401(a)(11)(A)(i) and (B); and 26 U.S.C. § 417(a)(1), (2)(A) and (3)(A). The Regulations involved are 26 C.F.R. § 1.401(a)-20, Q&A-5 and Q&A-11. The text of the relevant portions of these Statutes and Regulations are set forth at Appendix H, pp. 112a-120a.

STATEMENT OF THE CASE

William E. Knapp (Knapp) was a substantial participant in Employee Benefit Plans of American Metallurgical Products Company, Inc. (Ammet) and Satellite Alloy Corporation (SAC), being a Money Purchase Pension Plan of each company, and a Profit Sharing Plan of each company. In preparation for distributions from these four plans upon their termination, Knapp requested the law firm of Tucker Arensberg to prepare a Profit Sharing Plan for a newly formed company, AmCarb, into which he intended to cause the benefits from the four plans to transferred.

After preparation of numerous drafts of a Unanimous Written Consent for the Board of Directors of AmCarb, a Profit Sharing Plan and a Profit Sharing Trust, on Tuesday, July 2, 1985, Tucker Arensberg transmitted to Knapp a new Unanimous Written Consent, a revised Profit Sharing Trust and, for the first time, an Employment Agreement with a request that the foregoing documents be signed and returned, and it also transmitted a revised Profit Sharing Plan. This Profit Sharing Plan differed from all previous drafts in that five new pages were inserted in the middle of this 53 page Plan, which, unlike all prior drafts of the Profit Sharing Plan, provided that, in the case of married participant, any distribution upon retirement should be in the form of Qualified Joint and Survivor Annuity unless the participant's spouse consented to another form of distribution. The following Monday, July 8, 1985, there were returned to Tucker Arensberg executed copies of the Profit Sharing Trust, the Employment Agreement and the Unanimous Written Consent which adopted the Profit Sharing Plan and authorized AmCarb to enter into the Employment Agreement, provided that Knapp and Petitioner would be Trustees of the Profit Sharing Trust and provided that Knapp would be the Plan Administrator of the Plan pursuant to the Employment Agreement.[1]

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[1] The Statement in the Opinion of the Third Circuit that the executed copies of the documents transmitted to Knapp on July 2, 1985, and returned to Cramer on July 8, 1985, were lost, and Cramer could not produce them (21a), is contrary to the Record. At the Bench Trial in this case, Cramer produced, identified and there were admitted into evidence not only the unexecuted copies of the Unanimous Written Consent directing AmCarb to enter into the Employment Agreement, the Employment Agreement and the

On or about July 15, 1985, there was distributed from the Ammet and SAC Plans to or on behalf of Knapp real estate valued at $273,600, a Limited Partnership Interest valued at $24,000 and cash of $208,200, which, in the case of the real estate and Limited Partnership Interest were made by Trustee to Trustee transfers to the Trustees of the AmCarb Profit Sharing Trust and the cash was distributed to Knapp who rolled it over into the Profit Sharing Trust. The foregoing transfers from the Ammet and SAC Plans were made pursuant to an Election to Take Lump-Sum Distribution (110a-111a) signed by Knapp and his wife of 41 years, Evelyn Knapp, which was notarized by a Notary who asserted that the document had been sworn to and subscribed before her (111a); however, in her uncontested testimony at her Deposition, Evelyn Knapp testified that she did not appear before the Notary and did not even know who this person was (108a), and she could not recall whether her husband, who gave her the document for her signature, gave her any explanation of what the document was for (109a).

The practice at Tucker Arensberg when the Profit Sharing Plan was prepared was that the Plan consisted of three documents, the Cover, the Table of Contents and the Body of the Plan, and, in case of each of these documents which comprised the Plan, the person who typed the documents and any revision thereto would enter the date of the draft or revision in the upper right hand corner of the document. Based

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Profit Sharing Trust transmitted July 2, 1985, but also the executed copies of these documents returned to Cramer on July 8, 1985.

upon the foregoing, the copy of the 53 page Profit Sharing Plan in the records at Tucker Arensberg containing the Qualified Joint and Survivor Annuity language consist of a Cover bearing "Draft Dated 7/1/85" and the Body of the Plan bearing on the first page "Draft Dated 7/1/85"; however, the Table of Contents bears "Draft Dated 6/30/86".

It was in June, 1986, that Tucker Arensberg prepared an Application for a Determination of the Tax Exempt Status of the Profit Sharing Plan, and the Application Form 5301 bears the signature of Petitioner as Treasurer of AmCarb dated June 27, 1986. This Form, together with the Supplemental Application under TEFRA, TRA 1984 and REA (Retirement Equity Act), which is Schedule T to the Form 5301 and must accompany this Form, was transmitted to the Internal Revenue Service (I.R.S.) under cover of letter dated June 30, 1986, which demonstrates that the Table of Contents of the Profit Sharing Plan was revised the same day the Application for a Determination was transmitted to the I.R.S.. On July 23, 1987, the I.R.S. granted a favorable Determination as to the tax qualified status of the Profit Sharing Plan which contained the Qualified Joint and Survivor Annuity language.

There was never any segregation within the Profit Sharing Trust between the assets which had come from the Pension Plans of Ammet and SAC and those that came from their Profit Sharing Plans. AmCarb never made a contribution to the Profit Sharing Plan, and Knapp was the sole participant in the Plan. Because the Profit Sharing Plan was "top heavy", in

1990 and 1991 Knapp was required to take and took distributions from the Profit Sharing Trust.

By 1992 the real estate transferred to the Profit Sharing Trust from the Ammet and SAC Plans had been sold which produced a Purchase Money Mortgage on orange groves in Florida, new Limited Partnership Interests had been purchased by the Profit Sharing Trust and it also had purchased an Annuity at SMA Life Assurance Company (SMA). From March, 1992, through August of 1992, Knapp, as Trustee of the Profit Sharing Trust, without the knowledge of Petitioner, his Co-Trustee of the Profit Sharing Trust, transferred the Account of the Profit Sharing Trust at Charles Schwab to an IRA at Charles Schwab in his name, surrendered the Annuity at SMA in exchange for an IRA at SMA in his name and transferred most of the Limited Partnership Interests owned by the Profit Sharing Trust to an IRA at Lincoln Trust Company. The Beneficiary of each of these IRAs was Knapp's Insurance Trust which provided for the income to go to his spouse for her life and the principal to pass to the children of Knapp's prior marriage upon her death. The transfers to the IRAs at Charles Schwab and SMA were accomplished without the signature of Knapp's Co-Trustee and, in the case of the transfers of the Mortgage and Limited Partnership Interests to the Lincoln Trust IRA, the signature of Your Petitioner on these documents, which was required for these transfers, was forged.

The value of the Account transferred to the IRA at Charles Schwab was $159,126, the SMA Annuity transferred to the IRA at SMA was worth $102,000 and the value of the Mortgage and Limited

Partnership Interests transferred to the IRA at Lincoln Trust was $125,000. None of these transfers was consented to by Knapp's wife, Evelyn Knapp, and it was not until after the death of Knapp on February 17, 1993, when Your Petitioner went to use cash in the Profit Sharing Trust to pay bills, that Petitioner discovered the foregoing transfers from records of the Profit Sharing Plan and Trust, among which was one copy of the Profit Sharing Plan with Draft Dates of 7/1/85 and a corrected, 6/30/86 Table of Contents.

Petitioner brought this Action as the Surviving Trustee of the Profit Sharing Plan requesting that the assets transferred to the IRAs be returned to the Profit Sharing Trust. Insofar as relevant to this Petition, the District Court found that the I.R.S. Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-5, is invalid when it states that no rollover contribution to a plan can subject the plan to the survivor annuity rules of 26 U.S.C. § 401(a)(11) (90a-96a). On Appeal of this case to the Third Circuit Court of Appeals the Court invited the I.R.S. to submit a Brief *Amicus Curiae*, which it did, and in an Opinion which is basically a repetition of the I.R.S. Brief *Amicus*, the Third Circuit held that 26 C.F.R. § 1.401(a)-20, Q&A-5, is valid and that the rollover of Knapp's benefits from the Ammet and SAC Pension Plans did not subject the AmCarb Profit Sharing Plan to the survivor annuity requirements of 29 U.S.C. § 1055 and 26 U.S.C. § 401(a)(11) to a large extent because of Evelyn Knapp's consent to the Lump Sum Distributions from the Ammet and SAC Plans which the Court asserted was a waiver of her right to receive benefits in the form of a Qualified Joint and Survivor Annuity (7a, 19a-20a).

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons to Issue Writ

This issue in this case is whether the AmCarb Profit Sharing Plan was obligated to make distributions to Knapp in the form of a Qualified Joint and Survivor Annuity the answer to which turns on the provisions of 29 U.S.C. § 1055(b)(1)(C) and 26 U.S.C. § 401(a)(11)(B)(iii) (112a-113a, 115a-116a). This Profit Sharing Plan provided that a participant's death beneficiary was his spouse, 29 U.S.C. § 1055(b)(1)(C)(i) and 26 U.S.C. § 401(a)(11)(B)(iii)(I), Knapp did not elect payment in the form of a life annuity, 29 U.S.C. § 1055(b)(1)(C)(ii) and 26 U.S.C. § 401(a)(11)(B)(iii)(II), and there is no question that the Ammet and SAC Money Purchase Pension Plans were subject to the funding standards of 29 U.S.C. § 1082 and 26 U.S.C. § 412. Accordingly, the issue in the case becomes a question of the validity of the sentence in 26 C.F.R. § 1.401(a)-20, Q&A-5, which reads "[a] transfer made before January 1, 1985 and any rollover contribution made at any time, are not transactions that subject the transferee plan to the survivor annuity requirements with respect to a participant." The linchpin by which the I.R.S. supports this statement that a rollover does not subject a transferee plan to the joint and survivor annuity requirements of 26 U.S.C. § 401(a)(11) and 29 U.S.C. § 1055 with respect to the individual who makes the rollover to the plan, which was accepted by the Third Circuit, is that, in the case of a rollover, the spouse of the individual already will have waived a Joint & Survivor Annuity when the assets rolled over were distributed to the individual from a plan subject

to the joint & survivor annuity requirements. As such, the Third Circuit found that a second waiver by a spouse upon a distribution from the transferee plan would not serve any purpose (20a).

In this case when Evelyn Knapp executed the Election To Take Lump-Sum Distribution (110a-111a), she did not waive a Joint & Survivor Annuity. 29 U.S.C. § 1055(c)(2) and 26 U.S.C. § 417(a)(2) provide that an election to waive a Qualified Joint and Survivor Annuity shall not take effect unless the spouse of the participant consents in writing to the election and the spouse's consent acknowledges the effect of the election and is witnessed by a plan representative or a notary public (114a, 117a). Evelyn Knapp's uncontradicted testimony is that she did not appear before the Notary who signed the Election To Take a Lump-Sum Distribution, and the form she signed contains no acknowledgment that the effect of the Election was to waive a Qualified Joint and Survivor Annuity (110a-111a); however, the Third Circuit found that her consent to this Election to Take a Lump Sum Distribution was a waiver of her right to receive benefits in the form of a Qualified Joint and Survivor Annuity (7a). As such, the decision by Third Circuit in this case appears to be the same as the decision of the Seventh Circuit in Butler v. Encyclopedia Brittanica, Inc., 41 F.3d 285, 293-295 (7th Cir. 1994), where the Court found that a spousal waiver signed by the spouse was sufficient, even though it was claimed the signature was not witnessed by a Notary, since the signing of the waiver was substantial compliance with the Statutes. This decision and the decision in this case are in conflict with the decision by the Eleventh Circuit in Lasche v.

George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863 (11th Cir. 1997), and the decision in Alfieri v. Guild Times Pension Plan, 446 F. Supp 2d 99, 107-111 (E.D.N.Y. 2006), in which cases the Courts required strict compliance with the Statutes to effect a spousal waiver.

The foregoing conflict among the Circuits is not the only conflict which the decision by the Third Circuit embraces in its following the Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-5, because, in doing so, the Court has followed a Regulation which is directly contrary to another Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-11, which provides, in relevant part, "[a]ll benefits provided under a plan, including benefits attributable to rollover contributions, are subject to the survivor annuity requirements." (120a). This Regulation at Q&A-11 is directly contrary to the Regulation at Q&A-5 followed by the Court which states that a rollover contribution does not subject a plan to the survivor annuity requirements with respect to the individual who made the rollover (119a).

Finally, the Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-5, is contrary to the plain language of the Statutes which make the Joint & Survivor Annuity requirements applicable to a participant with respect to whom a plan is a "direct or indirect transferee" of his benefits from another plan that was subject to Joint & Survivor Annuity requirements. The Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-5, ignores the words "indirect transferee" in 26 U.S.C. § 401(11)(B)(iii)(III) and in 29 U.S.C. § 1055(b)(1)(C)(iii), (116a, 113a), which can only refer to a distribution from a plan to a former participant

who then rolls over this distribution to another plan which is, under these circumstances, an "indirect transferee".

These questions whether a spousal waiver must comply with the strict requirements of the Statutes and whether a rollover contribution to a plan is an "indirect transfer" are important questions, not only because of the conflict among the Circuits and the conflict between the I.R.S. Regulations, but because these are important federal questions which should be decided by this Court.

B. Evelyn Knapp Never Waived a Joint and Survivor Annuity

At the heart of the construction of 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(1)(b)(C)(iii) by the I.R.S. is the conclusion that, if there has been a distribution from a plan subject to the Survivor Annuity requirements of the Internal Revenue Code and ERISA, the spouse of a participant will have waived a Qualified Joint and Survivor Annuity upon the distribution from the plan before it is rolled over to another qualified plan. As such, the Service assumes that a spouse already will have waived a Qualified Joint and Survivor Annuity when a distribution was made from a plan subject to this requirement, as a result of which the Statutory purpose of involving the spouse in the distribution decision was realized, and there is no further purpose in requiring a waiver of a Qualified Joint and Survivor Annuity upon distribution from the plan into which the earlier distribution was rolled over (19a-20a).

In its Opinion the Circuit Court asserts that Evelyn Knapp, in consenting to a lump sum distribution to her husband from the Ammet and SAC Money Purchase Pension Plans, waived her right to a distribution in the form of a Qualified Joint and Survivor Annuity (7a). In so asserting the Third Circuit has given no credence to the testimony of Evelyn Knapp at her Deposition, at which she was shown a document headed "Election To Take Lump-Sum Distribution" (110a-111a), and was asked:

> "Q. Mrs. Knapp, I'll ask you to look at Exhibit 14 that we marked at Richard Cramer's deposition . . . . is that your signature on that document?
>
> A. . . . . This is my signature. . . .
>
> Q. And you signed that in front of the notary public?
>
> A. No. I don't know who that is, and I did not appear in front of her. . . .[2]
>
> Q. Who asked you to sign this document?
>
> A. Probably Bill.
>
> Q. Do you remember why?

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[2] There are two other instances in this Record where Knapp obtained a notarization of a signature without the signer appearing before the Notary, one of which signatures was a forgery.

A. No. He just gave it to me to sign, and I signed it." (107a-108a) (emphasis added).

Both 29 U.S.C. § 1055(c)(2)(A)(iii) and 26 U.S.C. § 417(a)(2)(A)(iii) provide that an election by a participant to waive a Qualified Joint and Survivor Annuity "shall not take effect unless . . . the spouse of the participant consents in writing to such election . . . and the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public". The requirement that a spousal waiver of a Qualified Joint and Survivor Annuity be in writing witnessed by a Plan Representative or Notary Public is an important requirement for such a waiver, not only because it insures that the signature on the waiver is that of the spouse, but is obviously intended to make the signing of such a waiver a formal act of importance and significance, and something far more than the act of a wife at the breakfast room table simply doing what her husband asked. With respect to whether there has been an ERISA waiver, at least one case has held that an exhaustive factual inquiry taking into account a number of factors is appropriate to determine whether there has been knowing and voluntary waiver. See, Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1367-1368 (2nd Cir. 1991).

Cases which have construed the above provisions have required strict compliance with the requirements of the Statutes. Thus, in Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863 (11th Cir. 1997), the purported spousal waiver was witnessed by neither a Plan Representative nor a Notary Public, and the spaces for their signatures as witnesses were

blank. Even though she signed the waiver, the Court enforced the requirement of the Statute as written, and held the spouse had not made a valid spousal waiver. The facts in Alfieri v. Guild Times Pension Plan, 446 F. Supp. 2d 99 (E.D.N.Y. 2006), are virtually identical to the facts in this case. In Alfieri there was a spousal waiver bearing a signature of the spouse which she testified "looks like my signature", and a document examiner testified that the signature on the waiver was hers; however, the Court found that the spouse never appeared before the Notary Public who notarized the document purporting to be a spousal waiver, that the spousal waiver in the document was not valid and that she never legally consented to a waiver. Alfieri v. Guild Times Pension Plan, supra., at p. 111. Based upon the Record in this case, although Evelyn Knapp consented to a lump sum distribution from the Ammet and SAC Pension Plans, she did not execute a valid waiver of a Qualified Joint and Survivor Annuity in connection with this distribution.

In addition to the requirement that a spousal waiver of a Qualified Joint and Survivor Annuity be witnessed by a Plan Representative or Notary Public, 29 U.S.C. § 1055(c)(2)(A) and 26 U.S.C. § 417(a)(2)(1)(A) require that a spousal consent "acknowledge the effect of [an] election [to waive a Qualified Joint and Survivor Annuity]". Although the Election To Take Lump-Sum Distribution recites "[w]e have reviewed and understand the various optional forms of payment under the Plans, including annuity options" (111a) (emphasis added), this was not an acknowledgment of the effect of a waiver of a Qualified Joint and Survivor Annuity, and there is no such acknowledgment in the document.

The SAC and Ammet Money Purchase Pension Plans were identical. Both Plans provided that the Normal Form of Distribution was a lump sum payment, and that, upon a participant's election, an Alternate Form of Distribution was available in the form of periodic installment payments over the lesser of the life expectancy of the Participant and his Beneficiary or 20 years. These were the only permissible methods of distribution from the SAC and Ammet Pension Plans, and, as such, the recital in the Election To Take Lump-Sum Distribution constituted only an acknowledgment of the other form of distribution available under the Plans, but it did not constitute an acknowledgment of the effect of an election to waive a Qualified Joint and Survivor Annuity, there not even being a provision for a distribution in this form under these Plans.

C. The Regulation at 26 C.F.R. § 1401(1)-20, Q&A-5, Is Contrary to the Plain Language of the Statutes, Is Contrary to the Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-11, and Can Produce a Result Contrary to the Purpose of the Retirement Equity Act

The issue before the Third Circuit was whether the AmCarb Profit Sharing Plan and Trust was, within the meaning of 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(b)(1)(C)(iii), a "direct or indirect transferee" of the Ammet and SAC Pension Plans as a result of the Trustee to Trustee transfers from the Ammet and SAC Money Purchase Pension Plans and Profit Sharing Plans to the AmCarb Profit Sharing Trust of the Virgin Island real estate, Florida real estate and the Limited Partnership Interest in Insured

Pension Investors which were in the Accounts of Knapp in the Ammet and SAC Pension and Profit Sharing Plans, and as a result of the rollover by Knapp to the AmCarb Profit Sharing Trust of the $208,120 cash in his Accounts in the Ammet and SAC Plans. The Third Circuit held that 26 C.F.R. § 1.401(a)-20, Q&A-5, which reads, in pertinent part:

> "A transfer made before January 1, 1985, and any rollover contribution made at any time, are not transactions that subject the transferee plan to the survivor annuity requirements with respect to a participant"

properly construes 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(b)(1)(C)(iii) which read:

> "This (paragraph) (section) [requiring distributions to be in the form of a Qualified Joint and Survivor Annuity] shall apply to . . .
>
> > any participant under any other individual account plan unless . . .
> >
> > > with respect to such participant, such plan is not a *direct or indirect transferee* (in a transfer after December 31, 1984) of a plan which is [subject to the Joint & Survivor Annuity requirements of this paragraph or section]."

It so concluded because the above provisions do not apply to rollovers from one plan to another since the words "direct or indirect transferee" refer only to involuntary transfers, typically incident to a merger,

acquisition, spin-off or the like, and not to rollovers, which are voluntary transfers (16a-18a), and since a rollover is a transfer by a former participant of a plan to another plan, the transferee plan is not the transferee "of a plan" within in the meaning of 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(b)(1)(C)(iii), but a transferee of the former participant in the other plan (18a-19a).

The Third Circuit Opinion first looks to other provisions of the Employee Retirement Income Security Act of 1974, as amended by the Retirement Equity Act of 1984,(ERISA, 29 U.S.C. § 1001, *et seq.)* in an effort to determine the meaning of the word "transfer", and specifically to 29 U.S.C. § 1054(g)(4) where the words "transferee plan" and "transferor plan" appear (17a-18a). The Opinion refers to § 1054(g)(4)(B) which makes this Subsection applicable to "plan mergers and other transactions having the effect of a direct transfer", but it overlooks the provisions of § 1054(g)(4)(A) which deals with a transfer between plans "pursuant to a voluntary election by a participant or beneficiary whose account [is] transferred". 29 U.S.C. § 1054(g)(4)(A)(iii). As such 29 U.S.C. § 1054(g)(4) deals with both voluntary and involuntary transfers, and does not support the Third Circuit Opinion that a "transfer" within 29 U.S.C. § 1055(b)(1)(C)(iii) refers only to involuntary transfers.

The other authorities referred to by the Third Circuit to support its conclusion that the words "transferee" and "transfer" in 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(b)(1)(C)(iii) refer only to involuntary transfers

deal with or refer only to direct transfers. 29 U.S.C. § 1058 quoted in the Opinion (17a) proscribes transfers by merger or consolidation or transfers between plans the effect of which would be to reduce the benefits available to a participant, and the House of Representatives Report quoted in the Third Circuit Opinion (19a) refers only to a "direct transfer of assets in connection with a merger, spin-off, or conversion of a plan" or "a direct transfer of assets solely with respect to a participant"; however, when 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(b)(1)(C)(iii) were finally enacted they referred to both "direct or indirect" transfers.[3]

Finally, the argument by the Internal Revenue Service that, in the case of a rollover, a transferee plan is not a transferee "of a plan", but of the participant in the other plan, again ignores the plain language of 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(b)(1)(C)(iii), which encompass transfers to an "indirect transferee". Where a participant receives a distribution from a plan subject to Survivor Annuity requirements and rolls it over into another plan, the plan into which the distribution has been rolled over is an "indirect transferee" of the plan that made the distribution.

---

[3] In fact, it was not until the enactment of the Tax Reform Act of 1986, P.L. 99-514, 100 Stat. 2941, that the words "direct or indirect" were added to 29 U.S.C. § 1055(b)(1)(C)(iii), Tax Reform Act of 1986,Ch. 2, § 1898(b)(2)(B), retroactive as if included in the Retirement Equity Act of 1984, P.L. 98-397, 98 Stat. 1426. Tax Reform Act of 1986, Ch. 2, § 1898 (j).

Because the I.R.S. Regulation in 26 C.F.R. § 1.401(a)-(20), Q&A-5, ignores the word "indirect" in 26 U.S.C. § 401(a)(11)(B)(iii)(III) which encompasses transfers to both "a direct or indirect transferee", this Regulation, which purports to exclude rollovers from the effect of this Subsection of the Code, is contrary to the plain language of 26 U.S.C. § 401(a)(11)(B)(iii)(III) and 29 U.S.C. § 1055(b)(1)(C)(iii). Moreover, 26 C.F.R. § 1.401(a)-(20), Q&A-5, upon which the Third Circuit relied is directly contrary to another Q&A in the same Regulation. 26 C.F.R. § 1.401(a)-20, Q&A-11, provides:

> "Q-11: Do the survivor annuity requirements apply to benefits derived from both employer and employee contributions?
>
> A-11: Yes. The survivor annuity benefit requirements apply to benefits derived from both employer and employee contributions. . . . All benefits provided under a plan, including benefits attributable to rollover contributions, are subject to the survivor annuity requirements." (emphasis added)

This Regulation at Q&A-11 properly recognizes that the Statutes, by their terms, apply to transfers to both "direct or indirect transferee[s]".

The basis the I.R.S. uses to support the validity of its Regulation at 26 C.F.R. § 1.401(a)-20, Q&A-5, is that, in the case of a rollover from a plan which was subject to the joint and survivor requirements of 29 U.S.C. § 1055(a)(1) and 26 U.S.C. § 401(a)(11)(A)(i), a spouse already will have waived a Qualified Joint and Survivor Annuity for the rollover to take place, and, as

such, already will have been involved in the distribution decision. For this reason the Third Circuit found that it would not further the foregoing Congressional purpose to subject the transferee plan to the joint and survivor requirements of the Statutes (19a-20). The foregoing, however, ignores the distinct possibility that the relevant facts and circumstances will have changed between the time of the rollover and the time of a distribution from the transferee plan. For instance, if a thirty year old employee changes employment and has only $1,500 in his Account with his former employer's plan that was subject to the joint and survivor annuity requirements, it is distinctly possible that his spouse would waive a Qualified Joint and Survivor Annuity because of the minimal value of a Survivor Annuity if the former employer's plan were to purchase a Qualified Joint and Survivor Annuity with the $1,500. However, if this $1,500 were invested by the plan into which it was rolled over at 15% per annum until the employee's retirement at age 65, the $1,500 would then be worth $180,760, which would certainly result in the employee's spouse making a different decision as to whether she would waive a Qualified Joint and Survivor Annuity. Similarly, if a spouse had great confidence in her husband's intention and ability to provide for her after his death, she might well waive a Qualified Joint and Survivor Annuity when her husband changes employment and permit a rollover to a transferee plan of another employer, but marital circumstances do change so that, if upon her husband's retirement, her confidence in his providing for her upon his death has waned, such as if, as in this case, he changed the disposition of his assets upon his death, the spouse would not now waive a Qualified Joint and Survivor Annuity. Under these

circumstances the position of the I.R.S. will have deprived this spouse of that which was intended for her when the Retirement Equity Act was passed.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Edward C. Leckey
Counsel of Record
1034 Fifth Avenue
3rd Floor
Pittsburgh, PA 15219
(412) 391-9937

William R. Caroselli
Caroselli Beachler McTiernan
& Conboy
312 Boulevard of the Allies
8th Floor
Pittsburgh, PA 15222-1917
(412) 391-9860

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 06-2483, 06-3161 & 06-3162

[Filed August 31, 2007]

JANICE B. LECKEY;
JANICE B. LECKEY, Executrix of the Estate of Evelyn O. Knapp, a/k/a Evelyn Olliffe Knapp, Deceased also known as JANICE BURGER LECKEY
Appellant

v.

PAUL W. STEFANO;
FRANK W. JONES,
Administrators of the Estate of William E. Knapp, Deceased, and Trustees of the Insurance Trust of William Knapp, deceased

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 95-cv-00108)
District Judge: Honorable David S. Cercone

Before: McKEE and AMBRO, Circuit Judges ACKERMAN,* District Judge

JUDGMENT

These causes came on to be heard on the record before the United States District Court for the Western District of Pennsylvania and were argued on April 24, 2007.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of the District Court dated June 6, 2005 and March 29, 2006 are hereby affirmed in part, vacated in part, and remanded for further proceedings. Costs taxed against the Appellees. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

Dated: August 31, 2007

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* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 06-2483, 06-3161 & 06-3162

[Filed August 31, 2007]

JANICE B. LECKEY;
JANICE B. LECKEY, Executrix of the Estate of Evelyn O. Knapp, a/k/a Evelyn Olliffe Knapp, Deceased also known as JANICE BURGER LECKEY
Appellant

v.

PAUL W. STEFANO;
FRANK W. JONES,
Administrators of the Estate of William E. Knapp, Deceased, and Trustees of the Insurance Trust of William Knapp, deceased

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 95-cv-00108)
District Judge: Honorable David S. Cercone

Before: McKEE and AMBRO, Circuit Judges
ACKERMAN,* District Judge

OPINION OF THE COURT

AMBRO, Circuit Judge

This is a battle for William Knapp's estate. It is in federal court because he kept much of his wealth in employee benefit trusts that were subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1461. Boiled down, plaintiff Janice Leckey, on behalf of herself and the estate of her deceased mother Evelyn Knapp (who initiated this suit before she died), claims that both ERISA and the terms of the various plans gave Evelyn[1] an interest in her husband's ERISA benefits. He, however, took lump-sum distributions of almost all of his plan assets before he died without Evelyn's consent and placed them in trusts that paid her some—but not all—of the money. The remainder went, through William's estate plan, to his children from a previous marriage.

In two orders—one granting partial summary judgment and one entering final judgment after a bench trial—the District Court denied Leckey any

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* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

[1] To make this opinion more readable, we refer to Evelyn and William Knapp by their first names. This permits us to avoid using confusing generic terms such as "Appellant," "Decedent," and "Plaintiff."

relief. This is a complicated case because it involves two different ERISA plans and three different kinds of ERISA causes of action.

One, brought under 29 U.S.C. § 1132(a)(2), is a derivative suit to redress the loss to the plan itself when William (allegedly) withdrew assets improperly. A threshold question in this claim is whether he had a duty to seek Evelyn's consent before taking a distribution at all. The District Court concluded that he did as a matter of law under the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (codified in scattered sections of titles 26 and 29), an amendment to ERISA. We disagree because we give effect to a Treasury Department regulation that interprets the Act differently. We hold, rather, that whether the duty attached is a fact issue that depends on the contents of the plan instrument. Unfortunately, because the plan instrument has been lost and the parties offer different versions, both of which are supported by some evidence, we must remand for a factual finding on this issue. We also vacate the District Court's findings that the plan itself suffered no loss because it is contrary to our holding in *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231, 235–36 (3d Cir. 2005), and we vacate the Court's finding that William's actions did not damage Evelyn or Leckey because it is clearly erroneous.

The second cause of action, brought under 29 U.S.C. § 1132(a)(3), seeks equitable relief for William's improper withdrawal from a different ERISA plan. On this claim, the District Court granted summary judgment to Leckey on the issue of liability but did not believe it could grant a remedy after the bench trial.

Having examined the record and the law, we see no legal or factual impediment to imposing a constructive trust on traceable assets that were wrongfully withdrawn, and so we remand for consideration of that remedy.[2]

I. Facts & Procedural History

As noted, Janice Leckey sues both in her personal capacity and as executrix of the estate of her mother Evelyn Knapp. The nominal defendants are Paul Stefano and Frank Jones as administrators of the estate of William Knapp and trustees of his residuary trust, both of which are part of his unified estate plan. Stefano and Jones are Pittsburgh attorneys appointed by the state probate court to act in these capacities. The real parties-in-interest are Charles Knapp and Linda Sumser, William's children by his first marriage and the primary beneficiaries of the residuary trusts. (For ease of use, we refer to the defendants collectively as the "Residual Beneficiaries" throughout this opinion.)

This dispute centers on the propriety of William removing certain assets from two employee-benefit-plan trusts without Evelyn's written consent. The plans were operated by the American Carbyde Corporation ("AmCarb"), which William formed in 1985. Initially, AmCarb had three owners: William (71%), Charles Knapp (20%), and Leckey (9%). In

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[2] Leckey's third cause of action, brought under 29 U.S.C. § 1132(a)(1)(B), is not pressed on appeal, as we explain in Part II, *infra*.

November 1985, Charles Knapp withdrew his interest by having AmCarb buy back his interest, and William's share rose to 88%, Leckey's to 12%.

Before he formed AmCarb, William had significant assets invested in the employee benefit plans of two former employers, both of which were in Chapter 7 bankruptcy liquidation in 1985. All four plans in which William had assets were set to terminate, and so he created the AmCarb Profit Sharing Plan (and a related AmCarb Profit Sharing Trust) to allow him to continue deferring tax on his assets. He named himself administrator of the Plan and trustee of the Trust. He also named Leckey a trustee of the Trust, though she later testified that her role was almost entirely passive.

William transferred just over $500,000-worth of assets into the Profit Sharing Trust, all of which derived from his former employee benefit plans.[3] He effected this by taking a lump-sum distribution of his accrued benefits in all previous plans, in effect rolling over assets in one set of plans to another. Evelyn signed a written consent to the election, thus waiving her right to receive the benefits in the form of a qualified joint and survivor annuity ("qualified annuity"). William was the only participant in the AmCarb Profit Sharing Plan, and AmCarb never

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[3] Specifically, he transferred real estate in the Virgin Islands and an orange grove in Florida worth a total of $273,595, a limited partnership interest worth $24,000, and cash in the amount of $208,199.

contributed anything to it, as it never achieved commercial success.

In 1985, William withdrew some $50,000[4] from the Trust and placed the money in individual accounts. In 1992, when he began winding up AmCarb, he withdrew the balance and again placed the money in individual accounts. To effect the 1992 transfer, William hired attorney James Wirtz. Using the copy of the Profit Sharing Plan and Profit Sharing Trust instruments that William provided,[5] Wirtz concluded that nothing prevented William from withdrawing the assets at his leisure. At William's direction, Wirtz developed a three-part estate plan. Important for our purposes is that William removed substantially all of the assets from the Profit Sharing Trust (though he did not formally wind it up) and placed them in "Insurance Trust B," a residuary trust that, upon his death, provided Evelyn with income for life. After her death, the trust corpus was to go to the Residual Beneficiaries (to repeat, William's children from a previous marriage). The trust corpus is largely intact and will remain so until this litig ation is resolved.

In 1986, AmCarb created a pension plan (the "AmCarb Pension Plan") and a related trust (the "AmCarb Pension Trust"). William named himself

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[4] The exact amount withdrawn is unclear, and the District Court did not resolve the issue because it ruled that the statute of limitations barred any dispute about the withdrawal.

[5] Whether these were correct copies of the plan and trust instruments in force at the time is disputed. The substance and import of the dispute are discussed at length in Part III.A.2, *infra*.

administrator of the Pension Plan and trustee of the Pension Trust. He and Leckey were the only eligible participants. AmCarb contributed a total of $72,000 to the Pension Trust between 1986 and 1987. In 1992, William withdrew all of the money from the Trust and placed it in individual accounts. Upon realizing that Leckey was entitled to some of the money, he transferred $10,386 from his personal brokerage account back into the Trust account (and subsequently caused the Trust to pay her that money). That same year he formally wound up AmCarb, and the IRS approved the termination of the Pension Plan effective December 31, 1991.

William died in 1993, and Evelyn and Leckey brought this action in 1995. The essential claim is that William wrongfully withdrew funds from both AmCarb trusts and deposited them in personal accounts, which had the effect of depriving Evelyn of the death benefits that she would have received had the funds remained in the trusts. This claim is based both on an ERISA requirement that distributions be paid out in the form of a qualified annuity unless the spouse signs a written consent to an alternate form of distribution, as well as plan language to that effect. It is undisputed that William's distributions did not take the form of qualified annuities. It is similarly undisputed that Evelyn did not consent in writing to these alternate forms of distribution.

As noted, Leckey translates these facts and allegations into three causes of action: (1) wrongful denial of benefits, 29 U.S.C. § 1132(a)(1)(B); (2) breach of fiduciary duty causing a loss to the plan, 29 U.S.C. § 1132(a)(2); and (3) a request for individual, equitable

relief to redress a violation of the REA's qualified annuity requirement, 29 U.S.C. § 1132(a)(3). The District Court granted summary judgment in Leckey's favor on the issue of whether the plans were subject to the ERISA qualified annuity requirement. It then held a bench trial on the issues of whether William breached his fiduciary duties in bad faith, caused a loss to the plan, and damaged Evelyn or Leckey. Following that trial, it concluded that William's actions caused losses neither to the plan nor to the plaintiffs. Therefore, it entered judgment in favor of the Residual Beneficiaries, and Leckey appealed.[6]

II. The § 1132(a)(1)(B) Claim

Section 1132(a)(1)(B) allows ERISA plan beneficiaries to sue their plans for benefits owed. For reasons we cannot discern from the record, the District Court did not award Leckey relief under this section, and Leckey does not press the matter on appeal.[7] Thus, we shall not address this claim further.

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[6] The District Court had jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291. We review questions of fact for clear error and questions of law *de novo*. *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 572 (3d Cir. 2006).

[7] In her brief, Leckey appears to abandon her § 1132(a)(1)(B) because it would be futile to sue a plan that no longer has any assets. While we have held that common-law principles of successor liability can aid ERISA plaintiffs in similar situations, *see Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Littlejohn*, 155 F.3d 206, 208 (3d Cir. 1998), we presume that counsel knows facts not before us that made this path unattractive here.

III. The § 1132(a)(2) Claim – The Profit Sharing Trust

Section 1132(a)(2) allows plan beneficiaries to sue plan fiduciaries personally for breaching their fiduciary duties. A violation of those duties allows, by way of § 1109, three remedies: (1) making good on the loss caused by the breach, (2) restoring any profits made using the assets of the plan, and (3) any other equitable or remedial relief the court deems appropriate. Section 1132(a)(2) actions are derivative in nature inasmuch as the plaintiff must assert a loss to the ERISA plan itself (not merely an individual claim for extracontractual damages). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985); *see also Graden v. Conexant Sys., Inc.*, ___ F.3d ___, slip op. at 8 (3d Cir. July 31, 2007). Consequently, the plan takes legal title to any recovery, which then inures to the benefit of the participants and beneficiaries who were injured.

Here, Leckey claims that William breached his fiduciary duty by withdrawing assets from the Profit Sharing Trust in a form other than a qualified annuity without Evelyn's consent. The District Court, however, ruled that this claim failed as a matter of law. To review that decision, we must resolve three issues: (1) whether William had a duty to take distributions only in the form of a qualified annuity; (2) if so, whether he breached that duty; and (3) if so, whether that breach caused a loss to the plan. We also address whether Leckey or Evelyn was damaged by William's act and whether the District Court properly ruled that any objection to the 1985 transfer is barred by the statute of limitations.

A. Whether the Profit Sharing Plan Was Subject to a Qualified Annuity Requirement

1. The Retirement Equity Act

Resolving cross-motions for summary judgment, the District Court ruled that the REA required William to obtain Evelyn's consent before transferring money out of the Profit Sharing Trust in a form other than a qualified annuity.

The REA amended ERISA. Its primary purpose was to protect surviving beneficiaries when their ERISA-participating spouses predecease them. *See* S.REP.NO.98-575, at 12 (1984). Under the REA, when a participant dies before be coming eligible to receive distributions of vested benefits, the surviving spouse is entitled to a qualified pre-retirement annuity. 29 U.S.C. § 1055(a)(2). (Under prior law, it was permissible for plans to provide that participants dying before becoming eligible to take distributions forfeited all accrued and vested benefits, thus leaving their surviving spouses with nothing.) In addition, the REA requires that plan fiduciaries pay out almost all benefits in the form of qualified annuities unless both spouses consent in writing to another form of distribution. 29 U.S.C. § 1055(a)(1) ("[I]n the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity . . . ."). Requiring the written consent of the non-participating spouse was purposeful: the Senate Finance Committee wrote that it included the rule "because the Committee believes

that a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely." *Id.* Thus, it was Congress's intent not just to provide the non-participating spouse income in the form of a qualified annuity, but also to ensure that he or she had a right to be involved in pension-related decisions.

While the REA's default rule that benefits must be paid out in the form of a qualified annuity applies to most ERISA plans, plans meeting the following three conditions are exempt from the requirement:

> (i) such plan provides that the participant's nonforfeitable accrued benefit (reduced by any security interest held by the plan by reason of a loan outstanding to such participant) is payable in full, on the death of the participant, to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under subsection (c)(2) of this section, to a designated beneficiary),
>
> (ii) such participant does not elect the payment of benefits in the form of a life annuity, and
>
> (iii) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in subparagraph (A) or (B) or to which this clause applied with respect to the participant.

29 U.S.C. § 1055(b)(1)(C). In layman's terms, this means that, for a plan to be exempt, it must (1) provide that accrued benefits go to the participant's spouse on his death, (2) not allow payment to the participant alone in the form of a life annuity, and (3) not have received money from a plan subject to the qualified annuity requirement.

The parties agree that the Profit Sharing Plan met prongs (i) and (ii). The question is whether the Plan was a "transferee" of plans to which the requirements applied. Treasury Department regulations that interpret the REA provide:

> If through a merger, spinoff, or other transaction having the effect of a transfer, benefits subject to the [qualified] annuity requirements of sections 401(a)(11) and 417 are held under a plan that is not otherwise subject to such requirements, such benefits will be subject to the [qualified] annuity requirements even though they are held under such plan. Even if a plan satisfies the [qualified] annuity requirements, other rules apply to these transactions. . . . A transfer made before January 1, 1985, and *any rollover contribution made at any time, are not transactions that subject the transferee plan to the [qualified] annuity requirements with respect to a participant.* If a plan is a transferee plan with respect to a participant, the [qualified] annuity requirements do not apply with respect to other plan participants solely because of the transfer.

26 C.F.R. § 1.401(a)-20(Q&A 5) (emphasis added).

As the District Court ruled, this regulation seems to exempt "rollover contributions" from the class of transfers that can trigger the qualified annuity requirement. Leckey argues that the Court misread the regulation. Specifically, she contends that the regulation merely provides that rollover contributions do not subject the *entire plan* to the qualified annuity requirement; rollover contributions do, however, subject the *individual participant* to them.

This reading is untenable because the regulation specifically states that a rollover contribution is not a transaction that subjects the transferee plan to the requirements "with respect to a participant." 26 C.F.R. § 1.401(a)-20(Q&A 5). The wording of the regulation is obviously administrative argot, but the District Court correctly concluded that it does not classify rollover contributions as transfers within the scope of § 1055(b)(1)(C). Thus, rollovers do not trigger the joint and survivor annuity requirements at all.

The Commissioner of Internal Revenue promulgated § 1.401(a)-20 pursuant to his power to prescribe all regulations necessary to the enforcement of the Internal Revenue Code. 26 U.S.C. § 7805. Specifically, the Code regulates whether a plan qualifies for tax-deferred status, which turns in part on its compliance with the qualified annuity requirement. 26 U.S.C. §§ 401(a)(11) & 417. Thus, it is within the power of the Commissioner to promulgate regulations concerning whether an ERISA plan complies with these requirements.

The question here is whether the regulation's distinction between rollover contributions and

transfers accords with Congress's intent in enacting § 1055(b)(1)(C). The Commissioner, who is participating as *amicus curiae*, argues that the term "rollover" is used to describe a distribution of a participant's benefits from an ERISA trust followed by the participant contributing those benefits into another qualified ERISA trust.

This definition is consistent with the Code. Section 402 defines "eligible rollover distributions" as "any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust." 26 U.S.C. § 402(c)(4). "Eligible rollover distributions" are excluded from income (and thus not taxable) if they are actually "rolled over" (*i.e.*, contributed) to another qualified retirement plan within 60 days. 26 U.S.C. § 402(c)(1). Thus, the Commissioner's definition of rollover as a distribution followed by a contribution between two qualified retirement plans comes directly from the Code. It is important to note that rollovers are *voluntary* transactions that plan beneficiaries undertake for the purpose of deferring tax or shielding assets from creditors. *See* 11 U.S.C. § 541(b)(7) (excluding contributions to ERISA plans from a debtor's bankruptcy estate).

In contrast, the Commissioner interprets "transfer" in § 1055(b)(1)(C) as meaning an *involuntary* (from the participant's perspective) movement of benefits among ERISA plans—typically incident to a merger, acquisition, spin-off, or the like. He argues that this interpretation is sensible in light of how "transfer" is used in nearby sections of ERISA. In § 1054(g), ERISA prevents employers from amending plans to decrease

benefits in many circumstances. The provision applies to "transfers" and to "plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan." 29 U.S.C. § 1054(g)(4)(B). This language suggests that "transfer" refers to involuntary movements of plan assets, not individual rollovers. Moreover, this section uses the "transferee plan" language of § 1055 to refer exclusively to involuntary transfers.

Perhaps more on point, § 1058 directly regulates plan mergers with the following language:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. § 1058. Here again, ERISA uses the word "transfer" to refer to involuntary movements of substantially all of a plan's assets, not to voluntary, individual-scale rollovers.

Putting together the "cardinal rule that a statute is to be read as a whole" with the statutory interpretation canon *ejusdem generis* (a general term following specific terms should be limited to things similar to the specific terms), we can conclude that

ERISA uses the word "transfer" to refer to involuntary movements of plan assets by plan administrators, not to distributions taken and reinvested by plan participants in another ERISA plan. *Cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) ("'[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'") (quoting 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991)); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *see also Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004) (noting that the rule of reading a statute as a whole and *ejusdem generis* can work together to make the meaning of a statute plain).

In addition, the Commissioner argues that even if a plan receiving a rollover contribution is in some sense a "transferee," it is not a "transferee . . . *of a plan*," as it must be for the qualified annuity requirement to attach. 29 U.S.C. § 1055(b)(1)(C)(iii) (emphasis added). Rather, it is a transferee of an individual. The text is ambiguous because it is not clear whether the phrase "of a plan" means merely that the transferred assets are in some way traceable to a previous ERISA plan or that the plan itself, acting through its administrator, actively transferred the assets. The Commissioner's reading is persuasive because, in the rollover context, the plan from which the assets are transferred is entirely passive—to the point that calling the new plan its "transferee" is unnatural. The participant receives a distribution of his benefits free and clear of all encumbrances; thus,

the assets received are no longer attributable to the previous plan in any meaningful sense.

The Commissioner also argues that the REA's legislative history supports the transfer/rollover distinction. The relevant House report explains that a plan not otherwise subject to the qualified annuity requirement becomes so if it "(1) receives a direct transfer of assets in connection with a merger, spin-off, or conversion of the plan, or (2) receives a direct transfer of assets solely with respect to a participant." H.R. REP. NO. 98-655 (Pt. 2) (1984). From this it appears that Congress intended to reach involuntary movements of assets, not voluntary contributions from a participant that came out of a previous distribution from another plan.

Further supporting the Commissioner's arguments is that while employers can, under some circumstances, effect transfers of substantially all plan assets to other plans without the participants' consent, rollovers are by definition voluntary on the participant's part. Thus, transferring assets from a plan to which the qualified annuity requirement applies to one to which it does not could effectively void the requirement. Hence, § 1055(b)(1)(C)(iii) prevents that result by applying the requirement to the transferee plan. Rollovers, however, are a different story. When an employee receives a distribution from a plan subject to the qualified annuity requirement, it must come in the form of a qualified annuity unless the spouse consents at that time to have it paid in another form. Here, William elected to take all of his distributions from his prior plans in lump-sum form, and Evelyn consented in

writing to that election. App. at 738. Thus, Congress's purpose of involving the spouse in the distribution decision was realized; it would not further that purpose to subject the AmCarb plans to the qualified annuity requirement.

Given the use of "transfer" in other sections of ERISA and the way the Commissioner's interpretation dovetails with the REA's history and purpose, it easily passes muster. Because we hold that 26 C.F.R. § 1.401(a)-20(Q&A 5) properly interprets the REA, we vacate the District Court's ruling that the regulation is invalid. Applying the regulation to this case, we hold that the REA does not subject the Profit Sharing Plan to the qualified annuity requirement.

2. The Profit Sharing Plan Instrument

In the alternative, Leckey argues that the Profit Sharing Plan instrument contained qualified annuity provisions. She relies on one version of the Profit Sharing Plan instrument. The Residual Beneficiaries counter that Leckey's version was never adopted by AmCarb's board and is therefore invalid. The question we resolve is whether the record evidence supports granting summary judgment on this issue for either; if so, we will not waste the parties' time with a remand.

At trial, Leckey called Richard Cramer, William's personal attorney. Cramer testified that he drafted the Profit Sharing Plan and Profit Sharing Trust instruments at William's direction. Leckey submitted a version of the plan that contained qualified annuity

language.[8] The cover page and the first page of the body of the plan are dated "7/1/85." The table of contents, however, which is between the cover page and the body text, is dated "6/26/86." Based on the date on the body of the plan (and not on personal recollection), Cramer testified that this version was in force no later than July 1985. Specifically, he testified that it was his firm's practice at the time scrupulously to type onto each draft the last date on which it was revised. Leckey also put in evidence a letter from Cramer to William dated July 2, 1985. The letter states that it includes the latest draft of the plan, trust instrument, a board resolution adopting the plan, and various other documents for him to sign and return. Leckey then admitted in evidence a letter dated July 8, 1985, from Edward Leckey,[9] another of William's attorneys, stating that he had enclosed executed copies of the documents sent on July 2. Unfortunately, the enclosures themselves were lost, so Cramer could not produce them, but he testified that he believed that an executed board resolution was enclosed.

On cross-examination, the Residual Beneficiaries submitted a June 3, 1985, letter from Cramer to William and the enclosed draft of the Profit Sharing Plan. This version did not have a qualified annuity requirement; rather, it allowed William to have his

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[8] Parroting the language of the REA, it required that any benefit payout be in the form of a qualified annuity unless Evelyn consented in writing to another form.

[9] As we have throughout this opinion, we continue referring to Janice Leckey as "Leckey." In this Part, when referring to Edward Leckey, we use his full name.

benefits paid out in any form he chose. Next, they submitted a June 10, 1985, memorandum from Cramer to his file. According to it, Cramer spoke with Edward Leckey that day about the Profit Sharing Plan. Edward Leckey told him that William and his son Charles were having a variety of disagreements over the business and that William might turn the business over to Charles earlier than expected. Because of this, William was concerned about Charles being able to take control of the Profit Sharing Plan, which William wanted to avoid, as virtually all of the money in it was his. The June 3 version of the plan allowed the AmCarb board to remove the Profit Sharing Trust's trustees and the Profit Sharing Plan's administrator at any time. Thus, William wanted the plan and trust instruments redrafted to protect his positions in the event of a change in corporate control.

The Residual Beneficiaries also put in evidence a letter from Cramer to William dated June 11, 1985, stating that it enclosed revised versions of the Profit Sharing Plan and Profit Sharing Trust instruments. Specifically, the letter stated: "[t]he documents now designate you [William] as trustee and prevent your removal absent judicial determination of cause for removal." They further put in evidence the version of the Plan instrument sent with the June 11 letter; it contained revisions consistent with the transmittal letter. It did not include a qualified annuity requirement. Next, the Residual Beneficiaries submitted a June 26, 1985, letter from Edward Leckey to Cramer, stating that enclosed were an executed copy of the Profit Sharing Trust instrument, an executed board resolution adopting the new Profit Sharing Plan, and the altered pages of the Plan

instrument. The letter also indicated that William would like additional revision to secure the trustees' ability to administer and dispose the assets in the Trust. This letter, Cramer testified, was the impetus for making the revisions contained in the July 1, 1985 version and for sending his July 2, 1985, letter to William. Cramer acknowledged that his July 2, 1985, letter referenced changes to the plan administrator's and trustees' powers but did not mention the addition of a qualified annuity requirement. Moreover, Cramer testified that he did not actually remember when he added that requirement; he merely surmised from the date on the body of the plan that its addition must have been part of the July 1 round of the revisions. He did not recall so much as speaking with William or Edward Leckey about the requirement.

The Residual Beneficiaries questioned Cramer about an IRS form that his firm submitted on June 27, 1986, requesting a determination that the Profit Sharing Plan was qualified for tax-deferred status. Next to a question asking whether the plan defines the term "joint and survivor annuity," neither the "yes" nor the "no" box was checked. Next to a question asking how distribution may be made, the boxes "lump sum" and "substantially equal installments" were checked; the "annuity contracts" box was not checked. Next to the question "Does this plan comply with the payment of benefits provisions of section 410(a)(11)," which is the Code's qualified annuity requirement, "N/A" was typed in. In various places on the form, the responses referenced sections of the profit sharing plan. When

compared to the alleged July 1 version (with the Qualified annuity requirement), the page number references were often off by a page or two.

On redirect, Leckey put in evidence a copy of the plan instrument that was certified by the IRS as the version in its files. It contained the qualified annuity requirement and was identical to Leckey's alleged July 1 version. Moreover, on a schedule of the IRS form (which, Cramer testified, would have been submitted with the form itself, though it bore no date), the response referenced section 6.04 of the plan—the section with the qualified annuity requirement, and referenced the correct page number for that section on the alleged July 1 version.

Aside from Cramer's testimony and the related exhibits, the only other relevant evidence offered at trial was James Wirtz's testimony that the copy of the Profit Sharing Plan that William gave him did not contain the qualified annuity language. William hired Wirtz for advice on removing assets from the Profit Sharing Trust and Pension Trust. The District Court, without concluding which copy of the Profit Sharing Plan was actually in force,[10] found that William did not

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[10] We note that the Residual Beneficiaries argue that the District Court actually resolved this issue at trial. They point to a finding of fact that reads "the plan document [that Leckey argues for] could not have been the draft of the Amcarb Profit Sharing Plan submitted to [William] Knapp [on] July 2, 1985." *Leckey v. Stefano (Leckey II)*, No. 95-108 (W.D. Pa. Jun. 6, 2007), at 4. They argue that by negative inference the District Court must have accepted their version. We see their point, but in that same opinion the Court entered a finding that "the above discrepancies

intentionally mislead Wirtz by providing him a copy without the qualified annuity language.

From all this evidence, the only thing clear is that which plan was in force is a material, disputed issue of fact with credible evidence on both sides of the question. Thus, summary judgment would not be appropriate, *see* FED. R. CIV. P. 56(C), and we must remand for the District Court to make a factual finding on this issue.

B. Bad Faith

The District Court, citing our opinion in *Burke v. LaTrobe Steel Co.*, 775 F.2d 88, 91–92 (3d Cir. 1985), ruled that in an ERISA breach-of-fiduciary-duty claim

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[in the various versions of the plan] do not prove when the spousal protection language was incorporated into the AmCarb Profit Sharing Plan." *Id.* at 6. In addition, the Court wrote in a previous order that the issue of which version governed would not be decided at trial because it was unnecessary in light of the Court's interpretation of the REA. *Leckey v. Stefano (Leckey I)*, No. 95-108 (W.D. Pa. Par. 26, 2004), at 21 (granting in part and denying in part cross-motions for summary judgment).

We harmonize these statements as follows: the version that Leckey presented was not *itself* the version that William received on July 2, 1985, but the Court did not actually resolve whether the qualified annuity requirement was in the version that he did receive. Thus, we cannot agree that the Court resolved this factual issue.

In any event, we are loathe to deem an issue of fact decided when the Court's language is so unclear and when the Court itself wrote in a previous opinion that it would not decide the issue. To do so would risk deferring to a finding of fact that was never made.

based on failure to follow the terms of the plan instrument, the plaintiff must show that the trustee failed to do so "in bad faith." We believe that the Court read *Burke* too broadly. In *Firestone*, the Supreme Court wrote that trust law fills in the details of ERISA fiduciaries' duties and how courts review their actions. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–12 (1989). The Second Restatement, in a section that the *Firestone* Court quoted and relied on, explains the degree of fault required to establish a trustee's breach of fiduciary duty:

> *a. Scope of the rule.* Ordinarily a trustee does not commit a breach of trust if he does not intentionally or negligently do what he ought not to do or fail to do what he ought to do. In other words, he does not commit a breach of trust unless he is personally at fault. He may, however, commit a breach of trust where he is not personally at fault, as where he acts under a mistake of law or fact, as is stated in the comments which follow.
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> *b. Mistake of law as to existence of duties and powers.* A trustee commits a breach of trust not only where he violates a duty in bad faith, or intentionally although in good faith, or negligently, but also where he violates a duty because of a mistake as to the extent of his duties and powers. This is true not only where his mistake is in regard to a rule of law, whether a statutory or common-law rule, but also where he interprets the trust instrument as authorizing him to do acts which the court

determines he is not authorized by the instrument to do. In such a case, he is not protected from liability merely because he acts in good faith, nor is he protected merely because he relies upon the advice of counsel. If he is in doubt as to the interpretation of the instrument, he can protect himself by obtaining instructions from the court. The extent of his duties and powers is determined by the trust instrument and the rules of law which are applicable, and not by his own interpretation of the instrument or his own belief as to the rules of law.

c. *Mistake of fact or law in the exercise of powers or performance of duties.* When the question whether the trustee has committed a breach of trust depends not upon the extent of his powers and duties, but upon whether he has acted with proper care or caution, the mere fact that he has made a mistake of fact or of law in the exercise of his powers or performance of his duties does not render him liable for breach of trust. In such a case he is liable for breach of trust if he is negligent, but not if he acts with proper care and caution.

Thus, if the trustee is authorized to invest trust funds in such securities as a prudent man would purchase, he is not liable if he invests in bonds which on the facts known to him are the sort in which prudent men would invest, although, owing to facts which he did not know and was not negligent in not knowing, the bonds were not in fact properly secured.

RESTATEMENT (SECOND) OF TRUSTS § 201 cmts. a–c (1959). Thus, when a trustee exercises his authority, a mere mistake will not render him liable for a loss. Only fault—in the form of bad faith or negligence—will. When, on the other hand, a trustee takes action that exceeds his authority, he is strictly liable for any loss (and accountable for any profit). While this may seem harsh, "[a] trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court." *Firestone*, 489 U.S. at 112 (citing G. BOGERT & G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 559 (2d rev. ed. 1980); RESTATEMENT (SECOND) OF TRUSTS § 201 cmt. b; *United States v. Mason*, 412 U.S. 391, 399 (1973)).

Our prior decision in *Burke* dealt with a mistake in the *exercise* of the trustee's powers: the plaintiffs accused the administrator of improperly denying their claim for pension benefits when they refused to comply with a work-recall request. Determining who is eligible for benefits—far from being *ultra vires*—is one of a plan administrator's key functions. *See* 29 U.S.C. § 1102(a)(1) & (b)(4). Thus, *Burke* held that to allege properly a breach of fiduciary duty, a plaintiff must allege more than mere error in discharging that duty. *Burke*, 775 F.2d at 91–92. Rather, he must allege some kind of fault. *Id.*

In our case, William allegedly distributed trust assets in an unauthorized form. If true, this is a mistake in the extent of his powers, not in his exercise of them. Thus, following the Restatement as *Firestone* requires, fault is not an element of the breach. *Firestone*, 489 U.S. at 112 (quoting RESTATEMENT

(SECOND) OF TRUSTS § 201 cmt. b). Moreover, even under a fault standard, Leckey has met her burden because an administrator who breaches "clear and unambiguous language" in the plan is not relieved of liability by acting in good faith, *Burke*, 775 F.2d at 92 (citing *Delgrosso v. Spang*, 769 F.2d 928, 938 (3d Cir. 1985)); *see also* RESTATEMENT (SECOND) OF TRUSTS § 201 cmt. c. If Leckey is correct that the plan included a qualified annuity requirement, the language of that requirement was clear:

> [U]nless the Participant elects otherwise in the manner provided herein, the normal form of benefit distribution for a . . . married Participant shall be a qualified joint and survivor annuity. . . . In order for a waiver of a qualified joint and survivor annuity . . . to be effective, the waiver must be in writing and must be consented to by the Participant's spouse. The spouse's consent to a waiver must be witnessed by a plan representative or notary public. App. at 162. Given the clarity of this requirement, failing to follow it establishes fault under our precedent.

We reject the District Court's finding that confusion over which version of the plan instrument was in place could somehow justify William's actions. At all relevant times, he was administrator of the AmCarb Profit Sharing Plan, trustee of the AmCarb Profit Sharing Trust, and controlling shareholder and President of AmCarb. He directed the creation of the Plan and Trust, oversaw the various revisions, administered both, and presided over and controlled the board that adopted it. In short, any confusion as

to which version the AmCarb board put into effect was William's own creation. To use this self-created confusion to excuse the breach of fiduciary duties owed to a plan beneficiary would turn ERISA and trust law topsy.

In addition, William is ineligible for the advice of counsel defense. Even if it is available in this context (and the Restatement disavows it), an element of the defense is providing the attorney with complete and accurate information. *See Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996); *accord Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 430 (6th Cir. (adopting *Howard*). It is undisputed that William did not provide to Wirtz the alleged July 1, 1985, version of the plan. If that were the plan adopted by the AmCarb board, then William did not provide complete and accurate information, and so seeking and following the advice of counsel cannot exonerate him.

C. Loss to the Plan

The District Court, applying its findings of fact to ERISA law, concluded that William's breach did not cause a loss to the Profit Sharing Plan. In analyzing whether that finding is wrong, we begin with the text of § 1132(a)(2). It allows beneficiaries to sue "for appropriate relief under section 1109." Section 1109 states, in relevant part, that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." From this, the elements of a § 1132(a)(2) claim appear to be (1) a plan

fiduciary (2) breaches an ERISA-imposed duty (3) causing a loss to the plan. *See Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995). Assuming that the plan contained a qualified annuity requirement, we have already explained that William was a plan fiduciary and that he breached his duty with the requisite level of fault. As to the third element, the Supreme Court held in *Massachusetts Mutual* that § 1132(a)(2) actions must be brought on behalf of the plan itself—and must, therefore, seek to restore losses *to the plan*. *Mass, Mut. Life Ins. Co.*, 473 U.S. at 147. It is not a vehicle for individual relief; rather, § 1132(a)(1) and (3) provide individual relief. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (holding that § 1132(a)(3) provides individual, equitable relief); 29 U.S.C. § 1132(a)(1)(B) (providing for individual recovery of wrongly withheld benefits). This is, of course, not to say that beneficiaries should not expect to benefit from § 1132(a)(2) actions. As beneficiaries, any assets restored to the plan will be distributed to them in accordance with the plan instrument.

The question, then, is whether William's breach caused a loss to the plan. Explaining how district courts should determine whether there has been a loss to the plan, the Eighth Circuit Court of Appeals has counseled that "a comparison must be made between the value of the plan assets before and after the breach." *Roth*, 61 F.3d at 603 (8th Cir. 1995). Here, the comparison is stark: before William withdrew assets from the plan, it held nearly $500,000; when he finished, it was all but bereft of assets. Hence, a loss to the plan.

The Residual Beneficiaries argue, however, that this action is a paradigm for individual recovery, not recovery on behalf of the plan, as William's breach only took assets out of one participant's account. Indeed, the Profit Sharing Plan only had one participant, so any loss to the plan is also a loss to one person's account. In *Schering-Plough*, 420 F.3d at 235–36, we held that losses need not be to all plan beneficiaries to be attributable "to the plan" in the § 1132(a)(2) sense; rather, it is possible for a loss to the plan to affect only a subset of beneficiaries. *Id.* In that case, the plaintiffs were former employees who had selected a particular investment package in their employer's 401(k) plan—one that they alleged was imprudent and should not have been offered. We held that the investment losses, though allocated to individual accounts, were still suffered "by the plan," and so § 1132(a)(2) was available. Under that logic, had but one person selected the imprudent package, he still would have been able to bring suit. Thus, there is nothing *per se* improper about an § 1132(a)(2) suit in which the plan suffers a loss that happens only to affect one individual's account. This result seems all the more correct in the context of a single-participant plan. We cannot imagine that Congress intended to cut off § 1132(a)(2) liability (which is, in most cases, the only means for recovering personally from a breaching fiduciary) because of the happenstance that the plan has only one participant.

The Residual Beneficiaries do, however, cite cases that emphasize the number of people affected by the alleged breach of duty. In particular, they cite *LaRue v. DeWolff, Boberg, & Assocs.*, 450 F.3d 570, 574, *clarified on panel reh'g* 458 F.3d 359, 362 (4th Cir.

2006), in which the Fourth Circuit Court of Appeals held that an individual alleging that his plan account lost money because the administrator failed to carry out his investment instructions does not assert a loss to the plan. *LaRue* is complicated by the fact that the plaintiff did not argue to the District Court a § 1132(a)(2) violation, and did not plead a loss to the plan. Still, *LaRue* is in tension with *Schering-Plough* because it emphasizes that the loss only affected one beneficiary, whereas we read *Schering-Plough* as focusing on whether the plan itself actually lost money no matter the number of individual accounts affected.[11] The Residual Beneficiaries also cite *Matassarin v. Lynch*, 174 F.3d 549, 566 (5th Cir. 1999), in which the Fifth Circuit Court of Appeals held that a § 1132(a)(2) claim could not proceed because it would only inure to the benefit of some of the plan's beneficiaries. The rationale, however, is principally that there was no loss *at all*. Thus we do not read it as disagreeing with our decision in *Schering-Plough*.

The other cases that the Residual Beneficiaries cite do not support their position. In *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991),

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[11] We acknowledge that the Supreme Court has granted *certiorari* in *LaRue*, partially (we assume) on the basis of its tension with *Schering-Plough* and similar cases in other circuits. *See* Brief for the United States of America as *Amicus Curiae*, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (U.S. pet. for *cert.* filed Nov. 6, 2006) (approving of *Schering-Plough* and arguing that the Court grant *certiorari* and reverse). Because of the differences in facts and posture, it is unclear whether the Supreme Court's decision will affect our case. Therefore, we merely apply our Court's precedent.

the plaintiffs did not claim that the administrators' decision to pay benefits directly rather than by purchasing an annuity had harmed the plan; in fact, the Court pointed out that it had improved the plan's bottom line. Here, on the other hand, William left the plan nearly bereft of assets. Similarly, in *Lee v. Burkhardt*, 991 F.2d 1004, 1009 (2d Cir. 1993), the plaintiffs sought individual damages stemming from the administrator's failure to give notice as to how the plan was funded; there was no colorable allegation of loss to the plan.

In sum, we follow the text: § 1132(a)(2) provides a proper cause of action when a beneficiary can show a loss suffered by the plan. Nothing in the text makes the number of beneficiaries affected relevant. Here, assuming Leckey's version of the plan instrument, William improperly emptied the plan of assets. That loss was suffered by the plan, and so § 1132(a)(2) is available. The District Court's findings to the contrary were premised on a misunderstanding of the law, and we vacate them.

D. Damages

At trial, the Residual Beneficiaries introduced evidence showing that William placed the assets that he took out of the Profit Sharing Trust into a residuary trust that provided Evelyn income for life (principal to the Residual Beneficiaries upon his death). From that trust she received some $172,000 while she was alive. The Beneficiaries' expert testified that she would only have received some $145,000 had the Trust assets

been used to purchase a qualified annuity.[12] On that basis, the District Court found that Evelyn was not damaged by William's breach of duty.

We take a very different view of the damages issue: when William misappropriated plan assets, a constructive trust arose immediately for Evelyn's ultimate benefit. *See* AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 426.4 (4th ed. 1988) ("Where the title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust *immediately* arises." (emphasis added)); *see also* RESTATEMENT (FIRST) OF RESTITUTION § 160 (1937). It encumbered *all* misappropriated assets *and their proceeds*. RESTATEMENT (FIRST) OF RESTITUTION § 205. When residuary trust assets were paid to Evelyn during her life, they came out of money encumbered by the constructive trust, and so those payments reduced the amount over which the constructive trust was imposed. Essentially, when the residuary trust paid money to Evelyn, it was merely conveying the *legal* title to assets of which she already held *beneficial* title (via the constructive trust). Thus, the payments can (and indeed must) be used to reduce the amount of money that the Profit Sharing Trust can recapture

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[12] We note that we are more than skeptical of this testimony, as the "expert" was not an actuary and did not claim any expertise in annuity pricing. He was, rather, a general securities broker, and his methodology (if it can be called that) was taking the average price of current qualified annuities and discounting for the passage of time. He did not price actual 1992 annuities.

both from the residual trust and in damages from William's estate.

We cannot accept the Residual Beneficiaries' argument that Evelyn received all to which she was entitled. Had William never removed the assets from the Profit Sharing Trust, Evelyn would have acceded to them on his death. Assuming that the plan contained a qualified annuity requirement, she had a right to object to any removal of trust assets other than in that form, and we cannot know to what she would have agreed had William not removed the assets. If the plan contain a qualified annuity requirement, William died after illegally removing assets from the Trust, and so the proper remedy for this 29 U.S.C. § 1132(a)(2) violation is to restore those assets. *See* 29 U.S.C. § 1109(a). Moreover, any proceeds from the assets removed are properly characterized as the profits from a breach of trust and must also be restored. *Id.*.

E. The 1985 Transfer

Leckey's § 1132(a)(2) claim comprises William's transfers of assets in 1985 and 1992. The District Court granted summary judgment in the Residual Beneficiaries' favor on the 1985 transfer because the statute of limitations expired before Leckey brought this suit. We agree.

ERISA provides a six-year statute of limitations. 29 U.S.C. § 1113(a). Leckey admits that she filed suit more than six years after the alleged breach, but she notes that, in cases of fraud or concealment, the statute does not begin to run until the breach was or

should have been discovered. 29 U.S.C. § 1113(c). To invoke that provision, however, the defendant must have taken "affirmative steps to hide its breach of fiduciary duty." *Ranke v. Sanofi-Synthelabo, Inc.*, 436 F.3d 197, 204 (3d Cir. 2004). Here, Leckey asserts that William actively concealed the breach from her by describing an account that contained the withdrawn funds as a "personal account." Even if this were sufficient to raise a fair inference of active concealment (which we doubt), Leckey's own deposition testimony is fatal: she admitted to knowing that William habitually took money out of the Profit Sharing Trust for living expenses as early as 1987. Thus, her own admission establishes that she knew money was leaving the Trust in a form other than a qualified annuity by that time. The limitations period, then, expired no later than 1993—before this suit was filed in 1995.

IV. The § 1132(a)(3) Claim – the Pension Plan

Section 1132(a)(3) allows ERISA beneficiaries to sue "to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of [ERISA] or the terms of the plan" (internal subparagraph and clause divisions omitted). Here, Leckey seeks equitable relief to redress William's violation of ERISA by improperly withdrawing assets from the Pension Trust. The District Court, however, denied relief. To determine whether this was correct, we address the following issues: (1) whether the withdrawal violated ERISA, and (2) whether an equitable remedy is available.

A. Whether William Violated ERISA by Withdrawing Assets from the Pension Trust

Finding a violation of ERISA is a prerequisite to awarding relief under § 1132(a)(3). The parties agree that the Pension Plan is subject to the qualified annuity requirement of § 1055. In its summary judgment order, the District Court recited as undisputed facts:

> In January 1992, W. Knapp transferred all of the funds from the AmCarb Pension Plan into a brokerage account in his name only. E. Knapp never consented to such transfer. In May 1992, W. Knapp transferred approximately $10,386, representing the amount of benefits due J. Leckey, back into the AmCarb Pension Plan's bank account. J. Leckey was subsequently paid that amount. The balance of the AmCarb Pension Plan withdrawals, approximately $61,614, remained in W. Knapp's personal brokerage account until his death in February 1993. Under the terms of the AmCarb Pension Plan, any balance in W. Knapp's pension account at the time of his death was to be distributed to his spouse, E. Knapp.

Leckey I, at 5–6. Thus, it is undisputed that William transferred money out of the Pension Trust without complying with those requirements.

These findings appear sufficient to establish an ERISA violation, but one of the District Court's

conclusions at trial complicates the issue. First, it stated in a footnote that it "finds no evidence of bad faith by [William] Knapp in the termination of, and distribution of assets from, the AmCarb Pension Plan." *Leckey II*, at 14 n.7. This relates back to the Court's conclusion that, "[i]n order to succeed on [the] breach of fiduciary duty [§ 1132(a)(2)] claims, Plaintiff must prove that Knapp failed to follow the terms of the plan in bad faith." *Id.* at 12 (citing *Seborowski v. Pittsburgh Press Co.*, 188 F.3d 163, 170 (3d Cir. 1999)). It is true that making out a valid claim under § 1132(a)(2) requires proving a breach of fiduciary duty, which, in certain circumstances, requires a showing of fault (negligence or bad faith). *See* Part III.B, *supra*. But this claim is brought under § 1132(a)(3), and making out such a claim does not require bad faith; it merely requires a violation of ERISA.[13] Thus, the District Court's conclusion that William did not act in bad faith is not relevant to this claim. All that matters is the District Court's conclusion on summary judgment that William's withdrawal from the Pension Plan violated ERISA. *See Leckey I*, at 22.

B. Whether an Appropriate Equitable Remedy Is Available

Despite finding a violation of ERISA, the District Court did not order relief on Leckey's § 1132(a)(3) claim. The two reasons it gave were a lack of bad faith, which the previous section has explained is not

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[13] In *Varity Corp. v. Howe*, 516 U.S. 489, 510 (1996), the Supreme Court noted that § 1132(a)(3)'s language is broad enough to cover violations of any of ERISA's provisions. *Id.*

relevant, and a lack of "evidence that the pension plan suffered any loss." *Leckey II*, at 14. But § 1132(a)(3) actions are *individual* actions, not actions on behalf of the plan. *See Varity Corp.*, 516 U.S. at 510. Hence, the § 1132(a)(2) requirement of showing loss to the plan does not apply. *Id.*

The real impediment to awarding relief under § 1132(a)(3) is that only traditional equitable remedies are available. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); *accord Great-West*, 534 U.S. at 209–10. Legal remedies like money damages—and even *legal* restitution—are not allowed. *Great-West*, 534 U.S. at 213. Thus, we can only accord Leckey relief if she has properly requested a remedy traditionally available in equity.

In her complaint, Leckey requested that the District Court "[g]rant mandatory injunctive relief directing that the defendant Administrators and Trustees transfer to [Leckey] all assets which were wrongfully distributed from the AmCarb Pension Plan, together with interest thereon." App. at 95. While styled as a request for injunctive relief, it is clear from the language that Leckey requested a restitutionary remedy; that is, she asked the Court to disgorge assets rightfully hers.

According to the Supreme Court, not all restitutionary remedies were traditionally available in equity; rather equity would restore only "money or property identified as belonging in good conscience to the plaintiff [that] could be easily traced to particular funds or property in the defendant's possession." *Great-West*, 534 at 213 (citing 1 DOBBS, LAW OF

REMEDIES § 4.3(1), at 587–88; RESTATEMENT (FIRST) OF RESTITUTION § 160 cmt. a; 1 G. PALMER, LAW OF RESTITUTION §§ 1.4, 3.7 (1978)). Here, Leckey alleges that the funds wrongfully withdrawn from the Pension Trust were deposited in a Charles Schwab brokerage account that is currently an asset of the William's estate (and thus under the control of the nominal defendants). The Residual Beneficiaries admit that the account is an asset of the estate. App. at 1082. Because some of the disputed assets are in an intact, traceable fund, equitable relief in the form of a constructive trust is available. RESTATEMENT (FIRST) OF RESTITUTION § 160; *see also Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 213 (3d Cir. 2004). The details, however, we leave for the District Court to determine on remand in accordance with common-law tracing rules.

It is difficult to determine the precise grounds for the District Court's refusal to accord Leckey relief for William's violation of the qualified annuity requirement imposed on the Pension Plan, but the Residual Beneficiaries argue that one of them (in addition to those already discussed) was its finding that neither Leckey nor Evelyn was damaged by William's breaches of duty. Indeed, the District Court did enter a blanket finding of fact that "[t]here is no evidence that Evelyn Knapp . . . was harmed by any alleged breach of fiduciary duties on the part of her husband." *Leckey II*, at 11. With regard to the Pension Plan, this finding is clearly erroneous. The evidence indicates (and, indeed, no one disputes) that the money from the Pension Trust went into William's personal brokerage account, where it stayed until he died. Upon his death, the account became an asset of

his estate, and nominal defendant Stefano himself testified that Evelyn received nothing from that account after William's death. App. at 1082. Because ERISA required that the Pension Trust money be paid in the form of a qualified annuity from which she would have benefitted, she was obviously damaged by William's transfer of the funds to a source from which she received nothing. While declaring a finding of the District Court clearly erroneous is not something we take lightly, we see nothing in the record supporting its assertion that Evelyn was not damaged.

V. Conclusion

We affirm the District Court's grant of summary judgment on the issue of the 1985 transfer. We vacate its entry of judgment in favor of the Residual Beneficiaries on the remainder of the § 1132(a)(2) claim and remand for further proceedings. The key issue on remand is factual: whether the plan instrument in force contained a qualified annuity requirement. If not, the claim fails. If so, the Court will have to determine the damages.

We also vacate the District Court's entry of judgment in favor of the Residual Beneficiaries on the § 1132(a)(3) claim and remand for further proceedings. Because an ERISA violation is established (and a finding of bad faith is not required), the only remaining issue is the imposition of an appropriate equitable remedy, which we leave to the District Court consistent with our discussion in Part IV of this opinion.

On both claims, we leave open all issues not decided in this opinion, including whether any set-off or contribution against Leckey is appropriate given her position as co-trustee.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2:95cv108

[Filed March 29, 2006]

JANICE B. LECKEY and	)
JANICE B. LECKEY,	)
a/k/a Janice Burger Leckey,	)
Executrix of the Estate of	)
Evelyn O. Knapp, a/k/a	)
Evelyn Olliffe Knapp, Deceased,	)
Plaintiffs,	)
	)
v.	)
	)
PAUL W. STEFANO and	)
FRANK W. JONES,	)
Administrators of the Estate of	)
William E. Knapp, Deceased,	)
and Trustees of the Insurance Trust	)
of William E. Knapp, Deceased,	)
Defendants.	)
	)

MEMORANDUM ORDER

March 29, 2006

Plaintiffs filed a Motion to Alter or Amend this Court's Order of June 6, 2005, or for Relief from this Order Entered as a Result of Inadvertence contending that the Court had previously entered summary judgment in favor of Plaintiffs and against Defendants with respect to the Amcarb Pension Plan. Plaintiffs requested that Finding of Fact No. 40 which reads :

> 40. There is no evidence that in terminating of the Amcarb Pension Plan and depositing the funds in his personal IRA[1] that Knapp caused any losses to the plan;

and Conclusion of Law No. 14(e) which reads:

> (e) there was no bad faith breach of fiduciary duty by Knapp in the termination of, and distribution of assets from, the Amcarb Pension Plan nor was there any loss suffered by the Pension Plan;

be deleted from the Court's Findings of Fact and Conclusions of Law. Plaintiffs also requested that the Judgment Order be amended to show that summary judgment had been ordered on the Pension Plan claim. Plaintiffs argue that because the Court granted partial summary judgment with respect to the Pension Plan,

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[1] Mr. Knapp actually deposited such funds in his personal investment account, not an IRA.

they had no reason to believe there was a need to enter evidence on the Pension Plan issue.

Defendant agrees that the Court determined at summary judgment that withdrawals from both the Pension Plan and the Profit Sharing Plan were unlawful because William Knapp failed to get his wife's consent before withdrawing his money from the plans, but Defendants contend that the issue of remedy was viable at trial.

This Court disagrees that Conclusion of Law No. 14(e) is contrary to the summary judgment opinion. At Conclusion of Law No. 8, the Court found:

> . . . it is argued that Knapp's breach was his failure to comply with the Plan documents by failing to distribute his assets to a joint and survivor annuity at termination of both the Amcarb Profit Sharing Plan and Amcarb Pension Plan[2]. This Court previously found that all of Knapp's benefits held in these Plans were subject to the joint and survivor annuity requirements of 29 U.S.C. § 1055. Therefore, a failure to establish the required annuity did not comply with the Plan documents. This Court must determine if Knapp was acting in his

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[2] The Court finds no evidence of bad faith by Knapp in the termination of, and distribution of assets from, the Amcarb Pension Plan. In addition, there is no evidence that the pension plan suffered any loss. Further discussions by the Court will concentrate on the Amcarb Profit Sharing Plan only. (Numbered footnote 7 in the Court's Findings of Fact and Conclusions of Law.]

> capacity as a fiduciary of the Plan when he decided to roll his assets from the profit sharing plan into his IRA, and if the failure to establish the annuity was willful or in bad faith.

This Court was obviously aware of its decision in its Memorandum Opinion dated April 26, 2004. However the Opinion did not address damages, it merely determined that the Plans were subject to the joint and survivor annuity. Regarding the Pension Plan, the Opinion expressly states:

> There are no genuine disputes of material fact . . . that the Amcarb Pension Plan was a defined benefit plan subject to the joint survivor annuity and spousal consent requirements of 29 U.S.C. Section 1055 and 26 U.S.C. Section 401. It is also undisputed that W. Knapp withdrew his balance in the Amcarb Pension Plan of $61,614 without [his wife's] consent. We find, therefore, that W. Knapp's withdrawal of the these funds was in violation of ERISA's joint and survivor annuity requirement.

See Opinion dated April 26, 2004, p. 22. Clearly, the Court's opinion did not address damages. The Court found that the Plan was subject to the joint survivor annuity[3], but went no further.

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[3] It should be noted that Janice Leckey was also paid $10,000 out of the Pension Plan without her spouse's consent. She failed to deposit the fund into a joint survivor annuity.

Moreover, Plaintiffs' filed a three (3) count complaint asserting: at Count One, a claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B); at Count Two, a claim of breach of fiduciary duty, pursuant to 29 U.S.C. §§ 1104 and 1132; and Count Three, a request for certain equitable relief related to payment of benefits, tax refunds and reimbursement of attorney's fees and costs. Nowhere in either the Opinion or Order of April 26, 2004, are the Plaintiffs' granted judgment on any of these counts.

Because the Court agrees that the location of the assets withdrawn from the Pension Plan has no bearing on the ultimate decision of the Court, the Court will excise from Finding of Fact No. 40 the language "and depositing the funds in his personal IRA." Otherwise, Plaintiffs' motion shall be denied.

Accordingly,

ORDER OF COURT

AND NOW, upon consideration of Plaintiffs' Motion to Alter or Amend this Court's Order of June 6, 2005, or for Relief from this Order Entered as a Result of Inadvertence (**Document No. 177**), the response thereto, arguments of counsel in open court, in accordance with the accompanying memorandum,

IT IS HEREBY ORDERED Plaintiffs' Motion to Alter or Amend is granted in part and denied in part. Plaintiffs' motion to alter or amend is **GRANTED** with regard to Finding of Fact No. 40 set forth in the Court's Findings of Fact and Conclusions of Law dated

June 6, 2005, which shall be amended to read as follows:

> 40. There is no evidence that in terminating of the Amcarb Pension Plan Knapp caused any losses to the plan.

In all other respects, Plaintiffs' Motion to Alter or Amend is **DENIED**.

s/ David Stewart Cercone
David Stewart Cercone
United States District Judge

cc: Edward C. Leckey, Esquire
1035 Fifth Avenue
Pittsburgh, PA 15219

William R. Caroselli, Esquire
Caroselli Beachler McTiernan & Conboy
312 Boulevard of the Allies
Eighth Floor
Pittsburgh, PA 15222

Harry F. Kunselman, Esquire
David A. Strassburger, Esquire
Strassburger, McKenna, Gutnick & Potter
Four Gateway Center, 22nd Floor
444 Liberty Avenue
Pittsburgh, PA 15222

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 95-108

[Filed June 6, 2005]

JANICE B. LECKEY and	)
JANICE B. LECKEY,	)
a/k/a Janice Burger Leckey,	)
Executrix of the Estate of	)
Evelyn O. Knapp, a/k/a	)
Evelyn Olliffe Knapp, Deceased,	)
Plaintiffs,	)
	)
v.	)
	)
PAUL W. STEFANO and	)
FRANK W. JONES,	)
Administrators of the Estate of	)
William E. Knapp, Deceased,	)
and Trustees of the Insurance Trust	)
of William E. Knapp, Deceased,	)
Defendants.	)
	)

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

June 6th, 2005

I. INTRODUCTION

This action arises out of a dispute over the estate of William E. Knapp (the "Estate" and "Knapp") and an insurance trust (the "Insurance Trust") which was created by Knapp. Plaintiffs in this action are Knapp's widow and second wife, Evelyn O. Knapp ("Evelyn"), and her daughter Janice Leckey ("J. Leckey") (collectively "Plaintiffs"). Knapp's children from his first marriage, Charles Knapp ("C. Knapp"), Linda Gail Sumser ("Sumser") and Corday Marie Mensch ("Mensch")[1], are defending the action on behalf of the Estate and Insurance Trust as authorized by the Orphans' Court Division of the Court of Common Pleas of Allegheny County, Pennsylvania.

Plaintiffs commenced this action pursuant to various provisions of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001 *et seq.* seeking to recover withdrawals Knapp made from certain ERISA covered employee benefit plans and trusts that ended up in the Estate and Insurance Trust. In addition to being a participant, Knapp was the administrator and a trustee of these ERISA plans and trusts. J. Leckey also served as a trustee of the ERISA trusts.

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[1] Ms. Mensch is deceased.

Plaintiffs contend that pursuant to 29 U.S.C. § 1055, an ERISA provision which mandates that a participant's benefits be paid in the form of a joint and survivor annuity unless the participant's spouse consents in writing to a different mode of payment, any disbursements from the ERISA plans and trusts were required to be in the form of a joint and survivor annuity absent Evelyn's written consent to the contrary. Plaintiffs contend that, because such consent was never given, the assets withdrawn from the ERISA plans and trusts should have been paid to Evelyn in the form of a survivor annuity and not transferred to the Estate and Insurance Trust.

Plaintiffs filed a three count complaint asserting at Count One, a claim for benefits pursuant to 29 U.S.C. Section 1132(a)(1)(B); at Count Two, a claim of breach of fiduciary duty, pursuant to 29 U.S.C. Sections 1104 and 1132; and at Count Three, a request for certain equitable relief related to the payment of benefits, tax refunds and reimbursement of attorneys' fees and costs. Following motions for summary judgment filed by the parties, the Court found: (1) all the benefits held in the profit sharing plan created by Knapp when he formed American Carbyde Corporation ("Amcarb" and the "Amcarb Profit Sharing Plan") in early 1985, were subject to the joint and several annuity requirements of 29 U.S.C. § 1055; (2) Plaintiffs' claim related to the 1985 withdrawals from the Amcarb Profit Sharing Plan was denied as barred by the applicable statute of limitations; (3) there was a material issue of fact as to whether Knapp acted wilfully or in bad faith, breaching his fiduciary duty, when making the various withdrawals at issue; and (4) the pension plan created by Knapp in 1986 or 1987

(the "Amcarb Pension Plan and Trust") was a defined benefit plan subject to the joint and survivor annuity and spousal consent requirements of 29 U.S.C. § 1055 and 26 U.S.C. § 401.

A non-jury trial was held before this member of the Court on January 18, 2005, and January 19, 2005. The parties have had the opportunity to file proposed Findings of Fact and Conclusions of Law and also to supplement such. The matter is now before the Court.

The following background facts are not in dispute and are hereby incorporated from this Courts Memorandum Order dated April 26, 2004. In early 1985, Knapp formed American Carbyde Corporation with seventy-one (71%) percent of the shares issued to Knapp, twenty (20%) percent of the shares issued to his son Charles Knapp, and nine (9%) percent of the shares issued to his stepdaughter, J. Leckey. By November of 1985, Charles Knapp had withdrawn from Amcarb and had sold his shares back to the corporation. As a result, Knapp's interest in Amcarb increased to eighty-eight (88%) percent, and J. Leckey's interest increased to twelve (12%) percent. By the end of 1987, Amcarb had no customers and closed its office. The corporation moved to Knapp's home and continued without a single sale until it ceased to exist in December of 1991.

FINDINGS OF FACT

1. In or about June of 1985, Richard W. Cramer, Esquire ("Attorney Cramer") and the law firm Tucker Arensberg began preparing the Amcarb Profit Sharing Plan at the request of Knapp and Edward C.

Leckey ("E. Leckey"). E. Leckey was acting as counsel for Knapp. Tr. pp. 22-26, 39; Defendant's Exhibits A, E and F.

2. In June of 1985, E. Leckey reported to Attorney Cramer that there were problems between Knapp and his son, Charles W. Knapp, with regard to Amcarb, and that Knapp may be turning over control of the company to his son earlier than originally intended. As a result, Knapp was concerned that he may be removed as the Trustee of the Profit Sharing Trust, and he wanted protection from such removal. Tr. p. 40; Defendant's Exhibit E.

3. By letter dated July 2, 1985, Attorney Cramer forwarded to Knapp: (1) an Employment Agreement between Knapp and Amcarb; (2) a draft of the Amcarb Profit Sharing Plan; (3) a revised Profit Sharing Trust; and (4) a Resolution of the Board of Directors. These documents had been revised to reflect changes made by E. Leckey. Tr. pp. 29, 39, 43-44; Plaintiffs Exhibit 1; Defendant's Exhibits I and J. The revisions made by E. Leckey were with respect to the desired protection of Knapp as the trustee and plan administrator. There is no mention of a change regarding the insertion of spousal protection language in the form of a qualified joint and survivor annuity provision. Tr. pp. 45-46. Moreover, throughout the drafting process there is a complete absence of any evidence of discussions regarding spousal protection language amongst either Attorney Cramer, E. Leckey or Knapp.

4. The draft of the Amcarb Profit Sharing Plan with a cover sheet dated July 1, 1985, contained the

spousal protection clause at Paragraph 6.04 which required that the normal form of benefit distributions for married participants be a qualified joint and survivor annuity unless otherwise consented to by the spouse of the participant. It should be noted, however, that only the cover page and page 1, titled "Article I" of this draft are dated "7/1/85." The second page of the draft, titled "TABLE OF CONTENTS" is dated "6/30/86." Therefore, the plan document marked Plaintiffs Exhibit 3 could not have been the draft of the Amcarb Profit Sharing Plan submitted to Knapp under the letter dated July 2, 1985. Tr. pp. 25, 51-53; Plaintiff's Exhibit 3.

5. Under cover of a letter dated July 8, 1985, E. Leckey returned to Attorney Cramer the executed Employment Agreement, the Profit Sharing Trust, and the Unanimous Consent of the Board of Directors. Tr. pp. 32-33; Plaintiffs Exhibits 6, 7, 8 and 9. Knapp was named the administrator[2] of the Amcarb Profit Sharing Plan and a trustee of the Profit Sharing Trust. J. Leckey was also a trustee of the Amcarb Profit Sharing Trust. Tr. p. 61 ; Plaintiffs Exhibits 4 and 5.

6. In or around June 27, 1986, the Amcarb Profit Sharing Plan was submitted to the Internal Revenue Service together with an Application for Determination for Defined Contribution Plan, Form 5301. The application is signed by Janice Leckey, but

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[2] Knapp was made administrator of the Plan so he would have better control over the Plan assets. The issue relating to Knapp being the Plan administrator was brought to Attorney Cramer's attention by E. Leckey. Tr. p. 23.

appears to have been completed by Attorney Laura Vassamillet. Tr. pp. 23-24, 48; Plaintiffs Exhibit 21; Defendant's Exhibit N.

7. At Part 12(d) of Form 5301, the following question is asked: "Does the plan define the following terms . . . Joint and survivor annuity?" The box for a response is blank. Part 17(d) of Form 5301 states "Distribution of account balance may be made in . . ." and the box for "Annuity contracts" is not checked. The boxes for "Lump sum" and "Substantially equal annual installments . . ." are checked, and further the form indicates that the information can be found at "§6.04 p.20-22." Further, Part 17(f) asks: "Does the plan comply with the payment of benefit provisions of section 401(a)(11)[3]" Curiously, the corresponding box for Part 17(f) is marked "N/A," not applicable. Tr. pp. 48-49; Plaintiffs Exhibit 21; Defendant's Exhibit N. The plan document allegedly submitted with Form 5301 contains the qualified joint and survivor annuity provision in Section 6.04, and Section 6.04 is set forth on pages 20 through 26. The information provided on Form 5301, therefore appears to contradict the language of the plan document allegedly in place as of July of 1985, as well as the language of the document submitted with Form 5301. The draft of the Amcarb Profit Sharing Plan marked Defendant's Exhibit G with the handwritten note "newest 6/14/85," however, does not contain the spousal protection language, and Section 6.04 is in fact set forth on pages 20-22.

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[3] Section 401 (a)(11) of the Internal Revenue Code requires a joint and survivor annuity for qualification of pension, profit sharing and stock bonus plans. 26 U.S.C. § 401 (a)(11); Tr. p. 49.

8. Part 17(p) of Form 5301 asks: "Does the plan prohibit assignment or alienation of benefits?" The "Yes" response box is checked and the form indicates that the information can be found at "§ 16.07 p.46." Section 16.07 of the plan document allegedly submitted with Form 5301, however, begins on page 51. Section 16.07 of the plan document marked Defendant's Exhibit G begins on page 46. Part 18 of Form 5301 refers to termination of the plan or trust and Articles XIII and XIV on pages 41, 42 and 43 of the plan document are referenced. Articles XIII and XIV of the plan document allegedly submitted with Form 5301 are set forth on pages 46, 47 and 48. The information requested by Part 18 can be found on pages 41, 42 and 43 of the plan document marked Defendant's Exhibit G. Tr. pp. 50-51; Plaintiffs Exhibit 21; Defendant's Exhibit G. Again, the information provided on Form 5301 appears to contradict the language of the plan document allegedly in place as of July of 1985, as well as the language of the document submitted with Form 5301.

9. Plaintiff tries to rehabilitate these discrepancies by indicating that Schedule T[4] of the submission at Parts 19(c) and 20 indicate that the plan document does have a qualified joint and survivor annuity and each part references "§ 6.04 p.20.[5]"

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[4] Schedule T is a Supplemental Application for Approval of Employee Benefit Plans Under TEFRA, TRA 1984, and REA.

[5] It should be noted, however, that in every draft of the Amcarb Profit Sharing Plan submitted to this Court, Section 6.04 begins on page 20. *See* Plaintiffs Exhibits 3 and 21; Defendant's Exhibits C, G and N.

Schedule T, however, is not dated. Moreover, the conflict between Form 5301 and Schedule T is a concern to the Court. In fact, the two forms, supposedly completed by the same law firm can not agree upon which page Section 6.05 of the Plan can be found. Part 17(c) of Form 5301 makes reference to "§ 6.05 p.22," but Part 27(a) and (b) of Schedule T references "§ 6.05 p.26." Section 6.05 of the Amcarb Profit Sharing Plan marked Defendant's Exhibit G can be found at page 22, while Section 6.05 of the plan marked Plaintiffs Exhibit 21 can be found on pages 26 and 27. It appears to this Court that Form 5301 and Schedule T were completed based upon two (2) different plan documents.

10. Though the above discrepancies do not prove when the spousal protection language was incorporated into the Amcarb Profit Sharing Plan, it clearly shows confusion on the past of the drafter's of the plan documents, which could conceivably lead to confusion on the past of Knapp.

11. Attorney Vassamillet sent the IRS an amendment to the Amcarb Profit Sharing Plan to on May 13, 1987 and a revised amendment on July 9, 1987. On July 23, 1987, the IRS made a favorable determination of Amcarb's application subject to adoption of the amendments by a date certain. There is no evidence in the record that the amendments to the plan documents were adopted by the Board of Directors of American Carbyde Corporation.

12. Prior to the formation of Amcarb, Knapp was employed by American Metallurgical Products Company, Inc. ("Ammet") and Satellite Alloy

Corporation ("SAC"). Knapp had retirement accounts with both Ammet and SAC, and wanted to roll those plans into the Amcarb Profit Sharing Plan. Tr. pp. 97-98; Defendants Exhibits E and I.

13. On or about June 26, 1985, Evelyn Knapp consented to the lump sum distributions from the Ammet and SAC retirement plans. Knapp took a lump sum distribution and rolled part of the assets into the AmCarb Profit Sharing Plan and part into his personal IRA's. Defendant's Exhibits E and M.

14. Knapp was the only participant in the Amcarb Profit Sharing Plan, and the Plan was funded solely from the assets of Knapp's Ammet and SAC retirement plans. Amcarb never contributed any money to the Amcarb Profit Sharing Plan. Tr, pp. 62-63.

15. This Court has found that all of Knapp's benefits held in the Amcarb Profit Sharing Plan were subject to the joint and survivor annuity requirements of 29 U.S.C. § 1055. *See* Memorandum Order, April 26, 2004, p. 20.

16. On or about May 23, 1986, Knapp designated his wife Evelyn as primary beneficiary of his Amcarb Profit Sharing Plan. Named as secondary beneficiaries of Knapp's Amcarb Profit Sharing Plan were: Linda Sumser, Corday Mensch, Charles Knapp, and Janet Leckey. The beneficiary designation form was prepared by E. Leckey. Defendant's Exhibits O and P.

17. Knapp acted as the investment manager for the Amcarb Profit Sharing Trust. Co-trustee, J. Leckey did not take part in the investment decisions. Moreover, J. Leckey represented to Charles Schwab, in writing, that Knapp was authorized to act independently with respect to the Amcarb Profit Sharing Trust Account held at Schwab. Tr. pp. 106-107; Plaintiffs Exhibit 23.

18. In 1986 or 1987, Amcarb created a pension plan (the "Amcarb Pension Plan") and a related pension trust (the "Amcarb Pension Trust"). Knapp served as the administrator of the Amcarb Pension Plan and was a trustee of the Amcarb Pension Trust. Knapp and J. Leckey were the only participants in the Amcarb Pension plan[6]. Amcarb made contributions to the Amcarb Pension Plan for the years 1986 and 1987. *See* Memorandum Order, April 26, 2004, p. 5.

19. An Out of Existence/Withdrawal Affidavit, signed by Knapp, was filed with the Pennsylvania Bureau of Corporations on or about August 13, 1992, which indicated that Amcarb ceased doing business on December 31, 1991. J. Leckey testified that she was aware that this was filed. Tr. pp. 120-121, 124; Defendant's Exhibit V.

20. The Federal Income Tax Return, Form 1040, filed jointly by Knapp and his wife, Evelyn, for the

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[6] This Court previously found that the Amcarb Pension Plan was a defined benefit plan subject to the joint and survivor and spousal consent requirements of 29 U.S.C. § 1055 and 26 U.S.C. § 401. *See* Memorandum Order, April 26, 2004, p. 22.

year 1990 shows income to the Knapps in the amount of $38,000.00 as a result of distributions from the American Carbyde Corporation Employees Profit Sharing Retirement Trust. Plaintiffs Exhibit 64.

21. The Federal Income Tax Return, Form 1040, filed jointly by Knapp and his wife, Evelyn, for the year 1991 shows income to the Knapps in the amount of $38,921.00 as a result of distributions from the American Carbyde Corporation Employees Profit Sharing Retirement Trust. Plaintiff's Exhibit 65.

22. J. Leckey was aware that Knapp was taking money out of the Amcarb Profit Sharing Trust, but voiced no objection. Tr. pp. 116-117.

23. In or around April of 1992, the Amcarb Pension Trust was terminated, and J. Leckey received a distribution of $10,386.00. Such distribution was not in the form of a joint and survivor annuity. There is no evidence that J. Leckey obtained the required consent of her spouse to receive the distribution in a form other than the required joint and survivor annuity. Tr. pp. 122-123; Defendant's Exhibit DD.

24. Though Knapp informed J. Leckey that the Amcarb Pension Trust was being terminated, J. Leckey never inquired whether steps were being taken to terminate the Amcarb Profit Sharing Plan. Tr. p. 123.

25. In 1991, Knapp contacted Attorney James H. Wirtz ("Wirtz") to review estate planning documents that had been previously prepared for him. Wirtz Video Deposition pp. 9-11.

26. Knapp related to Wirtz that the intent of his estate plan was to save federal estate taxes, provide for his wife if he predeceased her, and because this was a second marriage for him, he was concerned that his children inherit something from his estate. Wirtz Video Deposition pp. 11, 18.

27. In discussing estate planning matters, Wirtz also discussed with Knapp options for rolling over a profit sharing plan into an individual retirement account ("IRA") and the importance of proper beneficiary designations. Wirtz Video Deposition p. 13; Defendant's Exhibit S.

28. Knapp presented Wirtz with a list of assets for consideration in his estate plan. Wirtz Video Deposition pp. 14-16; Defendant's Exhibits Q and R.

29. Knapp also provided Wirtz with copies of the Amcarb Profit Sharing Plan and the Amcarb Profit Sharing Trust. Wirtz Video Deposition p. 18.

30. The copy of the Amcarb Profit Sharing Plan provided to Wirtz did not contain the joint and survivor annuity language, nor did Knapp inform Wirtz that the assets in the Amcarb plan came from prior pension plans. Wirtz Video Deposition pp. 19-20, 30-33. There is no evidence that Knapp intentionally provided Wirtz with a plan document that did not contain the joint and survivor annuity language.

31. Wirtz advised Knapp that he could roll over his Amcarb Profit Sharing account assets to an IRA and offered to help Knapp find a custodian that would

accept the assets held in his profit sharing account. Wirtz Video Deposition p. 21.

32. On or about August 19, 1992, Wirtz met with Knapp and his wife, Evelyn, to explain the estate plan that was to be implemented by Knapp. Wirtz prepared a flow chart to show how the assets would pass at Knapp's death, and also to give Evelyn an indication of the income she would receive if her husband predeceased her. Wirtz Video Deposition pp. 22-25; Defendant's Exhibit U.

33. The assets from Knapp's profit sharing plan were to fund the residuary trust from which Evelyn would receive the income for life and, at the discretion of the trustee, principal in the amount necessary for her health and support. Evelyn voiced no objections to the estate plan. Wirtz Video Deposition pp. 24-25; Defendant's Exhibit U.

34. On or about March 2, 1992, Evelyn signed her husband's IRA application with Lincoln Trust, which allowed the Insurance Trust of William E. Knapp to be the beneficiary of the IRA, and contained her consent to the naming of someone other than herself as beneficiaiy of her husband's IRA. Defendant's Exhibit Z.

35. In terminating the Amcarb Profit Sharing Plan, Knapp withdrew the assets from the plan and, based upon the advice of Attorney Wirtz, deposited the funds into IRA accounts in his name only. Knapp did not have his wife's consent for such distributions from the Amcarb Profit Sharing Plan. This occurred from

in or around April of 1992, until in or around August of 1992.

36. Knapp was always the only participant of the Amcarb Profit Sharing Plan, the only assets held in the plan were rolled over from his prior retirement plans, and Knapp made all the investment decisions regarding these investments.

37. Certain of the assets from the Amcarb Profit Sharing Plan required the signature of J. Leckey in order to have such assets re-registered to the successor custodian of Knapp's IRA. Tr. pp. 64-68; Plaintiffs Exhibits 47, 51 and 55.

38. Though her signature appears on certain documents, J. Leckey did not sign such documents. Tr. pp. 64-68, 80-82; Plaintiffs Exhibits 47, 51, 55, 56 and 57.

39. There is no evidence that in terminating of the Amcarb Profit Sharing Plan and depositing the funds in his personal IRA that Knapp caused any losses to the plan.

40. There is no evidence that in terminating of the Amcarb Pension Plan and depositing the funds in his personal IRA that Knapp caused any losses to the plan.

41. Knapp died on February 16, 1993. Tr. p. 103; Plaintiff's Exhibit 67.

42. From 1993 through 1998, $28,589.69 of income was distributed to Evelyn Knapp, from the

marital trust ("Trust A") of her husband's estate. Over the same time period, Evelyn received $177,693.46 in income distributions from the residuary trust ("Trust B") of her husband's estate. Tr. p. 147.

43. Because of certain expenses related to Evelyn' health, the Orphans' Court of Allegheny County, Pennsylvania allowed $50,000 of the principal of Trust A to be distributed to Evelyn. Tr. pp. 105-106.

44. There is no evidence that Evelyn Knapp, a beneficiary as defined under the Amcarb Profit Sharing Plan, and under ERISA, was harmed by any alleged breach of fiduciary duties on the part of her husband.

45. Evelyn died on December 13, 1997.

CONCLUSIONS OF LAW

1. This action was filed on January 26, 1995, under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*, to recover withdrawals Knapp made from certain ERISA covered employee benefit plans and trusts that ended up in the Estate and Insurance Trust.

2. Pursuant to 29 U.S.C. § 1132(a)(2), "[a] civil action may be brought by. . . . a fiduciary for appropriate relief under [29 U.S.C. § 1109] . . . ." Section 514(a) ERISA provides that ERISA shall supersede any and all state laws insofar as they relate to any employee benefit plan covered by the statute. 29 U.S.C.S. § 1144(a).

3. 29 U.S.C. § 1109(a) provides, in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall he personally liable to make good to such plan **any losses to the plan** resulting from each such breach,...

29 U.S.C. § 1109(a)(emphasis added).

4. Section 1104(a)(1) of Title 29 requires that a fiduciary "discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and . . . (a) for the **exclusive purpose of:** (i) providing benefits to participants and their beneficiaries . . ." *See* 29 U.S.C. § 1104(a)(1) (emphasis added).

5. An ERISA plaintiff is required to prove a breach of fiduciary duty and a *prima facie* case of loss to the plan or ill gotten profit to the fiduciary. *See Kemmerer v. ICI Americas, Inc.*, 70 F.3d 281, 290 (3d Cir. 1995) (acknowledging that ERISA plaintiff must prove a breach of fiduciary duty and a *prima facie* case of loss to the plan); *McDonald v. Provident Indemnity Life Insurance Co.*, 60 F.3d 234, 237 (5th Cir. 1995) ("the showing of a loss to the plan is required for any breach of fiduciary duty claim"); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). Once a plaintiff has made such a showing, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of fiduciary duty. *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992).

6. In order to succeed on their beach of fiduciary duty claims, Plaintiff must prove that Knapp failed to follow the terms of the plan in bad faith. *Seborowski v. Pittsburgh Press Co.*, 188 F.3d 163, 170 (3d Cir. 1999). Indeed, "a [participant] does not establish a violation of fiduciary duty simply by showing that the administrator did not follow the terms of the plan. If such action is undertaken pursuant to a good faith, albeit erroneous, interpretation, ERISA's fiduciary provisions are not violated. To establish liability, willful or bad faith conduct must be proved." *Burke v. Latrobe Steel Co.*, 775 F.2d 88, 91 (3d Cir. 1985).

If a breach is established, section 1132(a)(2) authorizes "appropriate relief under section 1109" of ERISA. Section 1109 requires a fiduciary who breaches his fiduciary duties "to make good to such plan any losses to the plan resulting from each such breach." Finally, section 1104 describes the scope of the duty owed by an ERISA fiduciary. *Bixler v. Central Pa. Teamsters Health-Welfare Fund*, 12 F.3d 1292, 1299 (3d Cir. 1993). ERISA fiduciaries have "a number of detailed duties and responsibilities, which include the proper management, administration, and investment of plan assets, the maintenance of proper records, the disclosure of specified information and the avoidance of conflicts of interest." *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 757 (S.D.N.Y. 2003) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-252 (1993).

8. In addition, an ERISA fiduciary may be liable for breaching his fiduciary duties through conduct adversely affecting the plan only to the extent that

conduct occurs while the individual is a fiduciary and falls within the scope of his fiduciary authority. *See* 29 U.S.C. § 1109; *Pegram v. Herdrich,* 530 U.S. 211, 225-226 (2000). ERISA, however, permits a fiduciary to wear "two hats" - for example by functioning at different times as an employer and a fiduciary. *See In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 757 (S.D.N.Y. 2003)(citing *Pegram v. Herdrich*, 530 U.S. at 225); *Varity Corp. v. Howe*, 516 U.S. 489, 498-505, (1996). Therefore, "[t]he 'threshold question' in an action charging breach of fiduciary duty under ERISA 'is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, performing a fiduciary function) when taking the action subject to complaint.'" *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d at 757 (quoting *Pegram v. Herdrich*, 530 U.S. at 226).

Here, it is argued that Knapp's breach was his failure to comply with the Plan documents by failing to distribute his assets to a joint and survivor annuity at termination of both the Amcarb Profit Sharing Plan and Amcarb Pension plan[7]. This Court previously found that all of Knapp's benefits held in these Plans were subject to the joint and survivor annuity requirements of 29 U.S.C. § 1055. Therefore, a failure

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[7] The Court finds no evidence of bad faith by Knapp in the termination of, and distribution of assets from, the Amcarb Pension Plan. In addition, there is no evidence that the pension plan suffered any loss. Further discussions by the Court will concentrate on the Amcarb Profit Sharing Plan only.

to establish the required annuity did not comply with the Plan documents. This Court must determine if Knapp was acting in his capacity as a fiduciary of the Plan when he decided to roll his assets from the profit sharing plan into his IRA, and if the failure to establish the annuity was willful or in bad faith.

Moreover, the line between fiduciary, employer, participant and beneficiary is somewhat blurred in this instance. Knapp was the only participant in the Plan, and the only assets in the Plan were his, rolled into the Amcarb Profit Sharing Plan with Evelyn's consent from previous retirement plans. Any action he took with regard to those assets affected only himself and his wife. Moreover, Knapp's co-trustee, J. Leckey, took a passive role in the Plan, not getting involved in any of the duties required of her position as a fiduciary.

9. When the Amcarb Profit Sharing Plan was terminated in 1992, Knapp made decisions regarding his distribution as a participant of the Plan. The evidence is clear that he sought the advice of counsel regarding his estate plan, as well as advice concerning the best course of action for the distribution of the assets in the profit sharing plan. Clearly, Knapp had no other participants of the Plan to be concerned with; there were no other participants. Further, the profit sharing plan was being terminated, so there were no adverse implications to the Plan based upon his choice of distribution. Therefore, Knapp was not acting in his fiduciary capacity when, at termination of the Amcarb Profit Sharing Plan, he chose to distribute his assets into an IRA rather than a qualified joint and survivor annuity.

Knapp was acting as a fiduciary of the Plan, however, when certain of his assets held in the Amcarb Profit Sharing Plan required the signatures of the plan trustees in order to have such assets re-registered to the successor custodian. Allowing the re-registration resulted in a failure to comply with the Plan documents by failing to distribute his assets to a joint and survivor annuity. The Court finds that the action of re-registration was a technical breach of his fiduciary duty to comply with the Plan documents.

10. Based on the findings of fact set forth above, this Court is hard-pressed to find that Knapp acted in bad faith in the technical breach of his fiduciary duty to comply with the plan documents. However, the Court is certainly troubled by the apparent forging of J. Leckey's signature on certain documents. The Court must view Knapp's actions in light of his co-trustee's complete hands off approach to her duties as a fiduciary of the Amcarb Profit Sharing Plan.

J. Leckey allowed Knapp to handle all investment decisions, she did not review statements of account for the plan, and, in fact, she signed an authorization for Charles Schwab that allowed Knapp to act independently of her with regard to the assets of the profit sharing plan held at Schwab. She admitted that she had no record keeping duties for the plan, and further testified that her duty as trustee was "to do what the administrator told me." Tellingly, J. Leckey admitted that she knew Knapp was taking money out of the profit sharing account to live on, but she did not object. Based on her obvious deference to her step-father's decisions, the Court believes that it is more probable than not that if Knapp had requested that J.

Leckey sign the documents required for re-registration of assets, she would have complied with his wishes. However, because the preponderance of the evidence suggests that Knapp had J. Leckey's signature forged on certain documents, this Court has little choice but to find bad faith regarding the re-registration of his assets to the custodian of his IRA.

11. Notwithstanding the finding by this Court that Knapp was not acting as a trustee of the plan when he decided to deposit his assets into an IRA instead of a qualified joint and survivor annuity, there is no evidence of bad faith that would support a finding of a breach of fiduciary duty. Prior to taking any action, Knapp sought the advice of counsel. Though Plaintiffs contend Knapp brought the incorrect plan document to Wirtz, there is no evidence this was intentional. Moreover, there is substantial evidence in this record that indicates uncertainty regarding which document was in effect at any particular time. Further, Knapp did nothing in a surreptitious manner. Knapp expressed to Wirtz an intent that his wife be provided for if he should predecease her. He had his wife accompany him to Wirtz's office for an explanation of the estate plan and an estimate of the type of income she would get if he predeceased her. Evelyn executed the documents necessary to allow Knapp to name Trust B as the beneficiary of his IRA. Moreover, nothing he did affected any other participant of the Plan, nor was the Plan itself affected in any way.

12. Because there is a finding of bad faith regarding Knapp's technical breach of his fiduciary duty with respect to the AmCarb Profit Sharing Plan,

the Court must now determine if the Plan suffered a loss. To determine whether there is a "loss to the plan" the Court must apply a three-step analysis. *See Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995). First, it must be decided whether the events underlying this action have resulted in a "loss." *Id.* Second, assuming that a "loss" has occurred, it must be determined whether that loss is "to the plan" or merely to the beneficiaries. Finally, the Court must determine whether the alleged breach of trust resulted in the identified losses to the Plan. *Id.* To the extent that there are ambiguities in determining loss, the ambiguities must be resolved against the trustee in breach. *Id.*; *Donovan v. Bierwirth,* 754 F.2d 1049, 1056 (2d Cir. 1985) (citing *Wooton Land & Fuel Co. v. Ownbey,* 265 F. 91, 99 (8th Cir. 1920)).

13. Plaintiffs can point to no evidence of a loss in this record[8], let alone a loss to the Plan. 29 U.S.C. § 1132(a) provides for the effect of ERISA's primary purpose, that of protecting the integrity of benefit plans, and not their beneficiaries. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-43 (1985) ("It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries . . . . But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets . . . ."). Under section 1109, a fiduciary who

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[8] Plaintiff contends that the Pennsylvania Inheritance Tax paid on the assets held in Knapp's IRA at the time of his death was a loss. It is a consequence of the estate plan, and a loss to Knapp's estate, but is not a loss in the context of ERISA.

breaches his fiduciary duty is liable to the plan--not to the beneficiaries individually. *Id,* at 141-42. Therefore a loss to beneficiaries is not a consideration for this Court, although the Court found there was no loss to Evelyn.

In cases involving a breach of a fiduciary duty to comply with plan documents, most losses are in the form of an investment loss that affects the plan as a whole, or a failure to deposit funds into participant accounts. *See e.g. DeBruyne v. Equitable Life Assr. Soc. Of U.S.,* 920 F.2d 457 (7th Cir. 1990)(Participants' action for violation of ERISA contending that investment managers did not adhere to plan directives requiring low risk and volatility resulting in loss due to stock market crash.); *Pacific Ins. Co., Ltd. v. Eaton-Vance Management,* 260 F. Supp. 2d 236 (D. Mass. 2002)(Employers liability to participants in ERISA profit-sharing plan, arising from its failure to identify participants and to find accounts for such participants in accordance with the plan documents.); *Day v. Wall,* 112 F. Supp. 2d 833 (E. D. Wis. 2000)(Employee benefits plan may be required to add money to participant's account where deficit was caused by plan's failure to comply with its own written procedures.).

Here, Knapp was the only participant in the Amcarb Profit Sharing Plan. The Plan was totally funded with Knapp's assets from previous retirement plans, and Amcarb never made a contribution to the Plan. The breaches took place at termination of the Plan, and only with regard to re-registration of certain assets from the Plan custodian to the custodian of Knapp's IRA. Therefore, the Court finds that any

breach of fiduciary duty by Knapp at termination of the Amcarb Profit Sharing Plan caused no loss to the Plan that would require this Court to craft an equitable and remedial remedy[9]. Moreover, disentangling the estates of both William and Evelyn Knapp in order to place assets into a terminated profit sharing plan is a solution that does not further the legislative purposes of either ERISA or the Retirement Equity Act of 1984.

14. In conclusion, this Court finds: (a) Knapp was not acting in his fiduciary capacity when, at termination of the Amcarb Profit Sharing Plan, he chose to distribute his assets into an IRA rather than a qualified joint and survivor annuity; (b) even if he was acting in hids fiduciary capacity there was no bad faith in such decision and therefore, there was no breach of his fiduciary duties; (c) Knapp acted in bad faith in having J. Lecky's signature forged on certain documents related to the re-registration of his assets to the custodian of his IRA; (d) such breach of fiduciary duty by Knapp did not cause any loss to the Amcarb Profit Sharing Plan; and finally, (e) these was no bad faith breach of fiduciary duty by Knapp in the termination of, and distribution of assets from, the Amcarb Pension Plan nor was there any loss suffered by the Pension Plan.

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[9] In Russell, the Supreme Court held that the language of ERISA § 409, which states that a fiduciary of a pension plan shall be subject to "such other equitable and remedial relief as the court may deem appropriate[,]" was not to be read too broadly . . . *Massachusetts Mutual Life Insurance Company v. Russell*, 473 US. at 144.

Judgment in this case shall be entered for Defendants and against Plaintiffs. An appropriate order shall be entered forthwith.

/s/David Stewart Cercone
David Stewart Cercone
United States District Judge

cc: Edward C. Leckey, Esquire
1035 Fifth Avenue
Pittsburgh, PA 15219

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 95-0108

[Filed April 26, 2004]

JANICE B. LECKEY and
JANICE B. LECKEY,
a/k/a Janice Burger Leckey,
Executrix of the Estate of
Evelyn O. Knapp, a/k/a
Evelyn Olliffe Knapp, Deceased,
Plaintiffs,

v.

PAUL W. STEFANO and
FRANK W. JONES,
Administrators of the Estate of
William E. Knapp, Deceased,
and Trustees of the Insurance Trust
of William E. Knapp, Deceased,
Defendants.

MEMORANDUM ORDER

This action arises from a family dispute over the estate of the late William E. Knapp ("W. Knapp"), and an insurance trust created by him (the "Estate" and the "Insurance Trust"). Plaintiffs are W. Knapp's widow and second wife, Evelyn O. Knapp ("E. Knapp"), and her daughter Janice Leckey ("J. Leckey"). W. Knapp's children from his first marriage, Charles Knapp ("C. Knapp"), Linda Gail Sumser ("Sumser"), and Corday Marie Mensch ("Mensch")[1], are defending this action on behalf of the Estate and Insurance Trust as authorized by the Orphans' Court Division of the Court of Common Pleas of Allegheny County.

Plaintiffs commenced this action pursuant to various provisions of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001 *et seq.* seeking to recover withdrawals W. Knapp made from certain ERISA covered employee benefit plans and trusts that ended up in the Estate and Insurance Trust. In addition to being a participant, W. Knapp was the administrator and a trustee of these ERISA plans and trusts. J. Leckey also served as a trustee of the ERISA trusts.

Plaintiffs contend that pursuant to 29 U.S.C. Section 1055, an ERISA provision which mandates that a participant's benefits be paid in the form of a joint/survivor annuity unless the participant's spouse consents in writing to a different mode of payment, any disbursements from the ERISA plans and trusts

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[1] Ms. Mensch is now deceased.

had to be in the form of a joint/survivor annuity absent E. Knapp's written consent to the contrary. They maintain that because such consent was never given, the assets withdrawn from the ERISA plans and trusts should have been paid to E. Knapp in the form of a survivor annuity and not transferred to the Estate and Insurance Trust.

Plaintiffs filed a three count complaint asserting at Count One, a claim for benefits pursuant to 29 U.S.C. Section 1132 (a) (1) (B) ; at Count Two, a claim of breach of fiduciary duty, pursuant to 29 U.S.C. Sections 1104 and 1132; and at Count Three, a request for certain equitable relief related to the payment of benefits, tax refunds and reimbursement of attorneys' fees and costs.

Defendants filed an answer denying that W. Knapp's withdrawals from the ERISA plans and trusts were improper in the absence of E. Knapp's written consent. Defendants also filed a counterclaim against J. Leckey for breach of fiduciary duty. Specifically, defendants contend that if W. Knapp's withdrawals were improper, J. Leckey breached her fiduciary duty as a trustee and therefore is responsible for any losses sustained by E. Knapp.

Pending before the court are Plaintiffs' Motion To Require Intervention Or Suffer Judgment By Default and Renewed Motion For Reconsideration Of Memorandum Order Dated June 5, 2002 (Doc. No. 139); Plaintiffs' Motion To Strike Claims And Defenses Not Raised In Pretrial Statement Or At The Pretrial (Doc. No. 139); Plaintiffs' Motion For Partial Summary Judgment With Respect To Profit Sharing (Doc. No.

139); Defendants' Motion For Partial Summary Judgment (Doc. No. 136); and Plaintiffs' Motion For Summary Judgment With Respect To Pension Plan (Doc. No. 139).

I. *Background*

Unless otherwise noted, the following background facts are not in dispute. In early 1985, W. Knapp formed American Carbyde Corporation ("AmCarb") with 71% of the shares being issued to himself, 20% to his son C. Knapp, and 9% to his step-daughter J. Leckey. By November 1985, C. Knapp had withdrawn from AmCarb and sold his shares back to AmCarb, resulting in W. Knapp's ownership interest rising from 71% to 88% and J. Leckey's interest rising from 9% to 12%. By the end of 1987, AmCarb had no remaining customers and consequently closed its office. The corporation moved to W. Knapp's home and continued without a single sale until its demise in December 1991.

AmCarb Profit Sharing Plan and Trust

Prior to AmCarb's formation in 1985, W. Knapp worked for American Metallurgical Products Company, Inc. ("Ammet") and Satellite Alloy Corporation ("SAC"). During his many years of employment with these companies, W. Knapp accumulated substantial balances in certain retirement accounts known as the Ammet Profit Sharing Plan, the SAC Profit Sharing Plan, the Ammet Money Purchase Pension Plan, and the SAC Money Purchase pension plan (collectively referred to as the "Ammet and SAC Plans"). In 1985, both Ammet and SAC were being liquidated in

bankruptcy court; thus, W. Knapp wanted to funnel the funds in the Ammet and SAC Plans into another tax-deferred vehicle. Accordingly, AmCarb created the AmCarb Employees Profit Sharing Retirement Plan (the "AmCarb Profit Sharing Plan") and the related AmCarb Employees Profit Sharing Retirement Trust (the "AmCarb Profit Sharing Trust"). W. Knapp was named as the administrator of the AmCarb Profit Sharing plan and a trustee of the AmCarb Profit Sharing Trust. J. Leckey was also named as a trustee of the AmCarb Profit Sharing Trust.

Shortly thereafter, W. Knapp transferred or caused to be transferred a substantial portion of the balances in the Ammet and SAC Plans, which totaled $505,794 in cash, real estate, and a limited partnership interest, into the AmCarb Profit Sharing Trust. Of the total $505,794 transferred, $63,643 was in the form of cash rolled over by W. Knapp from the Ammet and SAC Money Purchase Pension Plans and approximately $144,773 in the form of real estate and a limited partnership interest that was directly transferred from the Ammet and SAC Money Purchase Pension Plans by the trustees of those plans. The balance of the $504,794 rolled over came from the Ammet and SAC Profit Sharing Plans.

The AmCarb Profit Sharing Plan and Trust were funded entirely by the transfers from the Ammet and SAC Plans. AmCarb never made a contribution as the company never accomplished commercial success. W. Knapp was the only participant and the only individual that ever had vested benefits in either the AmCarb Profit Sharing Plan or AmCarb Profit Sharing Trust.

E. Knapp was W. Knapp's wife for 41 years prior to his death on February 16, 1993. E. Knapp was the death beneficiary of W. Knapp's retirement account in the AmCarb Profit Sharing Plan. W. Knapp withdrew $50,000 or $60,000 from the AmCarb Profit Sharing Plan in 1985 and approximately $463,000 in 1992 and put such funds into various individual retirement accounts ("W. Knapp IRAs") registered in his name only. Both withdrawals were done without E . Knapp's consent.

AmCarb Pension Plan and Trust

In 1986 or 1987, AmCarb also created a pension plan (the "AmCarb Pension Plan") and a related pension trust (the "AmCarb Pension Trust"). As president of AmCarb, W. Knapp served as the administrator of the AmCarb Pension Plan and was named as a trustee of the AmCarb Pension Trust. AmCarb made a contribution to the AmCarb Pension Plan in 1987 and 1988 for the years 1986 and 1987, respectively. W. Knapp and J. Leckey were the only individuals that ever became eligible to participate in the AmCarb Pension Plan.

In January 1992, W. Knapp transferred all of the funds from the AmCarb Pension Plan into a brokerage account in his name only. E. Knapp never consented to such transfer. In May 1992, W. Knapp transferred approximately $10,386, representing the amount of benefits due J. Leckey, back into the AmCarb Pension Plan's bank account. J. Leckey was subsequently paid that amount. The balance of the AmCarb Pension Plan withdrawals, approximately $61,614, remained in W. Knapp's personal brokerage account until his death

in February 1993. Under the terms of the AmCarb Pension Plan, any balance in W. Knapp's pension account at the time of his death was to be distributed to his spouse, E. Knapp.

W. Knapp sent a letter to the Internal Revenue Service requesting approval of the termination of the AmCarb Pension Plan which was subsequently granted effective December 31, 1991. The only participants in the AmCarb Pension Plan at the time of its liquidating distributions in 1992 were W. Knapp and J. Leckey.

I. *Plaintiffs' Motion to Require Intervention or Suffer Judgment by Default and Renewed Motion for Reconsideration of Memorandum Order Dated June 5, 2002*

Plaintiffs' Motion to Require Intervention or Suffer Judgment by Default and Renewed Motion for Reconsideration of Memorandum Order Dated June 5, 2002 represents their fifth attempt to add C. Knapp, Sumser, and Mensch as named parties to this action. For the fifth time, these motions will be denied.

A. *Background*

The facts underlying these motions are not in dispute. By order dated April 20, 1994, the Orphans' Court Division of the Court of Common Pleas of Allegheny County removed plaintiff J. Leckey and Mensch, J. Leckey's step-sister, as co-executrices of the Estate and co-trustees of the Insurance Trust (the "April 20th Orphans' Court Order"). *See* Pls.' App. (Doc. No. 141), Vol. I, Tab A, Ex. 1. In the same order,

the Orphans' Court authorized C. Knapp, Sumser and Mensch to defend litigation on behalf of the Estate and Insurance Trust that is related to W. Knapp's withdrawals from the Ammet and SAC Plans. *Id.* The April 20th Orphans' Court Order specifically states:

> Any successor administrator and trustee designated hereunder shall not be required to defend any litigation arising by reason of the Decedent's actions with respect to certain retirement plans in which he was a participant, plan administrator and/or trustee. In lieu thereof, Corday Marie Mensch, Charles W. Knapp and Linda Gail Sumser, any or all of them, are hereby **authorized to defend such litigation on behalf of the estate or trust, to the same extent and with the same rights and responsibilities that any successor administrator and trustee could so defend.**

Id. (emphasis added) .

On June 15, 1994, the Orphans' Court appointed defendants Stefano and Jones as the successor administrators and trustees of the Estate and Insurance Trust of W. Knapp, respectively. *Id.* at Ex. 2. Plaintiffs filed the instant suit on January 26, 1995 naming only Stefano and Jones as defendants. Stefano and Jones immediately notified C. Knapp, Sumser and Mensch that other than being party defendants, they were not going to defend the suit. Stefano and Jones also advised them, however, that they were authorized to defend the action pursuant to the April 20th Orphans' Court Order. *Id.* Stefano and Jones also

filed an affidavit in the instant case on February 15, 1995 stating that the defense of this action was the responsibility of C. Knapp, Sumser and Mensch pursuant to the April 20th Orphans' Court Order. *Id.*

Shortly thereafter, C. Knapp, Sumser and Mensch retained the law firm of Strassburger, McKenna, Gutnick & Potter ("Strassburger McKenna") to defend the suit on their behalf. *Id.* *Id.* at Ex. 3. Strassburger McKenna subsequently entered an appearance on behalf of defendants Stefano and Jones and proceeded to file an answer and counterclaim. Stefano and Jones later filed another affidavit stating that they did not engage counsel or enter a defense to the action in light of the April 20th Orphans' Court Order. They reiterated that C. Knapp, Sumser and Mensch are authorized to defend the action on behalf of the Estate and Insurance Trust. *Id.* at Ex. 4. They also state that Strassburger McKenna does not represent them and that the answer and counterclaim were filed on behalf of C. Knapp, Sumser and Mensch and neither filing represents their position. *Id.* Stefano and Jones conclude by saying that they have not adopted a position regarding the merits of plaintiffs' claims. *Id.*

On July 13, 1995, plaintiffs filed a Motion to Compel the Intervention of C. Knapp, Sumser and Mensch. United States Magistrate Judge Robert C. Mitchell denied the motion but granted plaintiffs ten days leave to file an amended complaint to include additional defendants. In lieu of an amended complaint, plaintiffs filed a motion for reconsideration that was promptly denied. Soon thereafter, plaintiffs filed yet another motion for reconsideration that was also denied.

Plaintiffs later took a different approach and filed a motion to tax appeal costs against C. Knapp and Sumser. United States District Court Judge Robert J. Cindrich denied the motion by memorandum order dated June 5, 2002 noting that neither C. Knapp nor Sumser were parties to the instant action. Judge Cindrich also noted that the April 20th Orphans' Court Order allowed C. Knapp and Sumser to defend the action and nothing contained in that order exposed them to personal liability for doing so.

B. *Motion to Require Intervention or Suffer Default Judgment*

Plaintiffs' motion to require intervention or suffer default judgment is actually another motion for reconsideration. Plaintiffs argue again that because the named defendants in this case, Stefano and Jones, have declined to defend the action, default judgment should be entered against them unless C. Knapp and Sumser enter an appearance on behalf of the Estate and Insurance Trust. They contend that the April 20th Orphans' Court Order does not grant C. Knapp and Sumser the authority to defend the action in the names of Stefano and Jones.

The court finds initially that plaintiffs have not demonstrated any grounds upon which reconsideration of this matter would be proper. Plaintiffs offer no new evidence that was not previously available, cite no change in the law, and proffer no argument indicating a clear error of law when the same motion was denied on four prior occasions. *See generally*, *North River Ins. Co. v. Cigna Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. (discussing standard for reconsideration).

The court further notes that despite plaintiffs' repeated arguments to the contrary, the broad and unequivocal language of the April 20th Orphans' Court Order, which authorizes C. Knapp and Sumser to defend the instant action on behalf of the Estate and Insurance Trust with the same rights and responsibilities as Stefano and Jones, includes defending in such individuals' names. Indeed, the Orphans' Court has recognized that a beneficiary has a right to actually *bring* a lawsuit in the name of an administrator when he or she would not be able to do so in their individual capacities. In *Flick Estate*, 70 Pa. D&C.2d 303, 304 (1974), the Orphans' Court of Montgomery County explained:

> Our duty is to determine whether [beneficiary] has a right to have the suit brought, and we are satisfied that there is sufficient color to her claim to justify such action. She cannot do so herself in her individual capacity (*Kilpatrick Estate*, 368 Pa. 399, 84 A.2d 339 (1951)), since the executors alone have the right to sue on behalf of the estate. We must either direct the executors to bring the suit (*Kyler's Estate*, 75 Pa. Superior Ct. 422 (1921)), or authorize the beneficiary to sue in their name.

Anticipating the instant suit, the Orphans' Court here, like the court in *Flick Estate*, granted beneficiaries C. Knapp and Sumser the right to defend this suit, a right they otherwise did not have, instead of ordering Stefano and Jones to do so.

The court also notes that the primary purpose of plaintiffs' repeated attempts to force C. Knapp and

Sumser to enter an appearance in the case appears to be a misguided attempt to have this court block any payment for attorneys' fees and costs related to the defense of the case from being paid out of the Estate. The issue of what fees and costs are properly paid out of the Estate and/or Insurance Trust, however, is a matter of state law to be decided by the Orphans' Court, not this court.

In any event, plaintiffs cite no incidents of any disbursements out of the Estate and/or Insurance Trust for attorneys' fees and costs related to the instant action. Plaintiffs refer only to two petitions for reimbursement of attorneys' fees that Strassburger McKenna submitted to Stefano and Jones. Both petitions, however, were denied. Moreover, even if Stefano and Jones improperly disbursed funds from the Estate or Insurance Trust, plaintiffs must seek redress for such disbursements by asserting a state law fiduciary claim again them.

Plaintiffs also complain that the Estate is insolvent because of legal expenses incurred by Mensch before she was removed as executrix. This assertion is somewhat puzzling given that plaintiff J. Leckey was apparently co-executrix during the same period. In any event, a claim for the recovery of improper disbursements by a prior executrix of the Estate would clearly be a state law claim and not properly before this court.

C. Renewed Motion for Reconsideration of Memorandum Order Dated June 5, 2002

Plaintiffs argue that the court should reconsider Judge Cindrich's June 5, 2002 memorandum order denying the motion to tax appeal costs against C. Knapp and Mensch because proposed drafts of the April 20th Orphans' Court Order submitted by counsel demonstrate that Judge Cindrich's interpretation of that order was a clear error of law.

Plaintiffs have not demonstrated any grounds upon which reconsideration of the June 5, 2002 memorandum order would be proper. They cite no authority supporting their assertion that the lawyer submitted proposed orders should be considered to clarify the April 20th Orphans' Court Order. Indeed, the April 20th Orphans' Court order needs no clarification. As the court discusses above, the broad and unequivocal language of the April 20th Orphans' Court Order, authorizes C. Knapp and Sumser to defend the instant action on behalf of the Estate and Insurance Trust with the same rights and responsibilities as Stefano and Jones, which includes defending in those individuals' names. Moreover, Judge Cindrich correctly held in his June 5, 2002 memorandum order that C. Knapp and Sumser are not exposed to personal liability for plaintiffs' appeal costs by virtue of their defense of this action pursuant to the April 20th Orphans' Court Order.

Accordingly, plaintiffs' motion to require intervention or suffer default judgment and motion for reconsideration of the June 5, 2002 memorandum order will both be denied.

II. *Plaintiffs' Motion to Strike Claims and Defenses Not Raised in the Pretrial Statement or at the Pretrial Conference*

Plaintiffs argue that certain claims and defenses defendants assert in response to their motion for summary judgment should be stricken because such claims and defenses were not raised in defendants' pretrial statement or at the pretrial conference. More specifically, plaintiffs contend that defendants argue for the first time that a different version of the AmCarb Profit Sharing Plan allowed withdrawals without spousal consent and that plaintiffs must prove that W. Knapp acted wilfully and in bad faith. Plaintiffs further contend that defendants belatedly identify an expert witness on the issue of damages.

This motion requires little discussion. The parties filed their respective pretrial statements in this case in April of 1996. The case has since gone through an appeal and remand, a change of counsel, and an extended stay for mediation. Furthermore, the Clerk of Courts has been unable to locate the majority of the file in this case, including the parties' pretrial statements. *See* Judge Cindrich Order Dated March 27, 2003 at (Doc. No. 132). Consequently, a new scheduling order will be entered granting the parties a brief period to update their discovery and witness lists and file new pretrial statements. Plaintiffs will not be prejudiced, therefore, as they will have a sufficient opportunity to prepare for defendants' legal arguments and depose defendants' expert prior to trial.

Accordingly, plaintiffs' motion to strike claims and defenses not raised in the pretrial statement or at the pretrial conference will be denied.

III. *Plaintiffs' Motion for Partial Summary Judgment With Respect to Profit Sharing Plan and Defendants' Motion for Partial Summary Judgment*

Plaintiffs and defendants move for partial summary judgment with respect to the AmCarb Profit Sharing Plan and argue the following threshold issues.

A. *Retirement Equity Act*

Plaintiffs argue that W. Knapp's withdrawals from the AmCarb Profit Sharing Plan violated the Retirement Equity Act of 1984 (the "REA"), which amended ERISA to require distributions from certain employee benefit plans to be in the form of a survivor annuity absent spousal consent to another form of distribution. Defendants argue in response that W. Knapp's withdrawals were not improper absent spousal consent because the AmCarb Profit Sharing Plan was funded by rollover contributions which are exempt from the REA's coverage.

The REA amended ERISA and the Internal Revenue Code ("IRC"), as reflected at 29 U.S.C. Section 1055 and 26 U.S.C. Section 401, respectively, by requiring that distributions from certain employee benefit plans be in the form of a survivor annuity unless a participant obtains spousal consent to an alternative form of payment. Section 1055(b), which is essentially identical to the IRC at 26 U. S. C. Section

401 (a) (11) (B) , provides that such requirement applies to the following plans:

(b) Applicable plans

(1) This section shall apply to--

(A) any defined benefit plan,

(B) any individual account plan which is subject to the funding standards of section 1082 of this title, and

(C) any participant under any other individual account plan unless--

(i) such plan provides that the participant's nonforfeitable accrued benefit . . . is payable in full, on the death of the participant, to the participant's surviving spouse . . .

(ii) such participant does not elect the payment of benefits in the form of a life annuity, and

(iii) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in subparagraph (A) or (B) or to which this clause applied with respect to the participant.

> Clause (iii) of subparagraph (C) shall apply only with respect to the transferred assets (and income therefrom) if the plan separately accounts for such assets and any income therefrom.

29 U.S.C. Section 1055 (b) .

A profit sharing plan, like the AmCarb Profit Sharing Plan, falls into the "any other individual account plan" referred to in subsection (b) (1) (C). Thus, participants in profit sharing plans that satisfy the criteria listed at subsections (b) (1) (C) (i) - (iii) may withdraw their funds at any time and in any form without spousal consent. There is no dispute that the AmCarb Profit Sharing Plan satisfied the first two criteria - (i) E. Knapp was the death beneficiary of W. Knapp's account in the AmCarb Profit Sharing Plan and (ii) W. Knapp did not elect a benefit in the form of a life annuity. The parties disagree, however, as to criterion (iii), i.e., whether with respect to W. Knapp, the AmCarb Profit Sharing Plan was not a direct or indirect transferee (in a transfer after December 31, 1984) of either a defined benefit plan or any individual account plan that was subject to the funding requirements of 29 U.S.C. Section 1082.

As previously noted, the AmCarb Profit Sharing Plan received approximately $63,643 in cash and $144,773 in real estate, representing 13% and 29% of the total $504,794 transferred, respectively, from the Ammet and SAC Money Purchase Pension Plans. The balance of the amount transferred to the AmCarb Profit Sharing Plan came from the Ammet and SAC Profit Sharing Plans. Apparently, the Ammet and

SAC Profit Sharing Plans were not subject to the joint and survivor annuity requirements of 29 U.S.C. Section 1055. Plaintiffs submitted undisputed evidence that the Ammet and SAC Money Purchase Pension Plans, however, were subject to the joint and survivor annuity requirements of Section 1055 because those pension plans were subject to the funding requirements of 29 U.S.C. Section 1082. Aff. of Edward Leckey, Pls' App., Vol. II, Item J, Exs. 5 and 6. Based on the language of Section 1055(b), therefore, it appears that the AmCarb Profit Sharing Plan with respect to W. Knapp was subject to the joint and survivor annuity requirement because it was a direct and/or indirect transferee of the assets from the Ammet and SAC Money Purchase Pension Plans.

The court further notes that the undisputed evidence indicates that the AmCarb Profit Sharing Plan never maintained a separate accounting of the assets received from the Ammet and SAC Money Purchase Pension Plans versus the Ammet and SAC Profit Sharing Plans. *See* Pls.' App. Vol . III, Item O, paras. 8 & 9. Thus, all of W. Knapp's benefits held in the AmCarb Profit Sharing Plan appear to be subject to the joint and survivor annuity requirements.

Defendants argue, however, that pursuant to a temporary regulation issued by the IRS in 1985, the AmCarb Profit Sharing Plan was not a transferee plan with respect to W. Knapp. Specifically, defendants cite an excerpt from the temporary regulation, which was later codified at 26 C.F.R. Section 1.401(a)-20(A-5), which states: "A transfer made before January 1, 1985, **and any rollover contribution made at any time, are not transactions that subject the transferee**

plan to the survivor annuity requirements with respect to a participant." 50 Fed. Reg. 29371 (July 1985) (A-7) (Temporary Regs.) (emphasis added). Defendants maintain that all of the assets W. Knapp transferred to the AmCarb Profit Sharing Plan were actually "rollover contributions," including the assets from the Ammet and SAC Money Purchase Pension Plans. Defendants contend, therefore, that the AmCarb Profit Sharing Plan was not subject to the survivor annuity requirements with respect to W. Knapp because rollover contributions made at any time do not subject a transferee plan to such requirements.

The parties cite no cases, nor has the court uncovered any, where the "any rollover contributions made at any time" provision of Section 1.401 (a) - 20 (A-5) has been applied or even discussed. Based on the plain language of the IRS regulation, the court agrees with defendants in that such regulation clearly provides that the rollover contributions from the Ammet and SAC Money Purchase Pension Plans would not subject the AmCarb Profit Sharing Plan to the survivor annuity requirements with respect to W. Knapp. The court finds, however, that the regulation is ineffective because it conflicts with 29 U.S.C. Section 1055(b).

"The role of the courts in interpreting a statute is to give effect to Congress's intent. Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory authority interpretation begins with plain language of the statute itself." *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir.

1998) (citations omitted). If possible, a regulation should be read so as not to conflict with the statute it implements. *LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Management Comm'n*, 866 F.2d 616, 623 (3d Cir. 1989). A regulation that conflicts with a statute under which it was promulgated, however, is ineffective. *Id.*; *see United States v. Mead Corp.*, 533 U.S. 218, 226 (2001) (even when an agency is expressly delegated authority to clarify a specific provision of a statute by regulation, a court should not follow a regulation that is "manifestly contrary to the statute").

The plain language of the 29 U.S.C. Section 1055(b)(1)(C)(iii) clearly indicates that an exempt plan will be subject to the survivor annuity requirement with respect to a participant if the plan is "a direct or indirect transferee (in a transfer after December 31, 1984)" of assets from a non-exempt plan. In other words, if an exempt plan either directly or indirectly receives a transfer of assets from a non-exempt plan after December 31, 1984, the exempt plan becomes subject to the survivor annuity requirement with respect to those assets. The regulation at 26 C.F.R. Section 1.401(a)-20(A-5) essentially mirrors the statutory language at 29 U.S.C. Section 1055(b)(1)(C)(iii) as it states that assets transferred "before January 1, 1985" are not transactions that subject the transferee plan to the survivor annuity requirements. The regulation adds the exception not contained in the statute, however, that "any rollover contributions made at any time" are also transactions that do not subject the transferee plan to the survivor annuity requirements.

This additional exception actually conflicts with the statute in application as there is no discernable difference between the terms "direct or indirect transfers" and "rollover contributions" in the context of 29 U.S.C. Section 1055 (b) (1) (C) (iii), meaning that the statutory survivor annuity requirement could always be circumvented by labeling a transfer a rollover contribution. Indeed, the definitions of "rollover" cited by plaintiffs and defendants both refer to such term as a direct or indirect transfer of assets. *See* U.S. Master Pension Guide para. 1970 at pp. 472-73 (CCH 2001) ("A direct rollover is distinguished from an ordinary [or indirect] rollover . . . in that the funds are paid directly from the plan to . . . another plan . . . rather than being paid to the recipient who then transfers the funds to another plan."); 7 Stand. Fed. Tax Rep. (CCH), para. 18,922.033 (2003) ("A rollover is a direct or indirect transfer of assets from one retirement plan to another . . . .") It could not have been Congress's intent to allow assets in a non-exempt plan to be converted to exempt status at any time simply by moving those assets to an exempt plan and labeling such transfer a rollover contribution.

Accordingly, the court finds that all of W. Knapp's benefits held in the AmCarb Profit Sharing Plan were subject to the joint and survivor annuity requirements of 29 U.S.C. Section 1055.

B. *1985 Withdrawals*

Defendants move for summary judgment as to the 1985 withdrawals from the AmCarb Profit Sharing Plan and Trust arguing that plaintiffs' challenge to those withdrawals is barred by the applicable six-year

statute of limitations. Plaintiffs argue in response that defendants' motion should be denied because there is a genuine dispute of material fact as to whether W. Knapp concealed the 1985 withdrawals.

ERISA provides that the statute of limitations period for breach of fiduciary duty claims is either (a) six years after the date of the last action which constituted part of the breach; (b) three years after the earliest date on which the plaintiff had actual knowledge of the breach; or (c) in the case of fraud or concealment, six years after the date of discovery of the breach. 29 U.S.C. Section 1113. ERISA does not provide a statute of limitations period for non-fiduciary claims. The most analogous state statute of limitations is used instead. *See Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 208 (3d Cir. 2001). Defendants contend that for purposes of considering the instant motions, the court should assume that the state six-year "catch all" statute of limitations found at 42 Pa. Cons. Stat. Ann. Section 5527 applies to plaintiffs' claim to benefits cause of action at Count One. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1181 (3d Cir. 1992).

The 1985 withdrawals occurred more than nine years prior to the filing of the instant suit. Thus, the statute of limitations has run on these withdrawals absent some evidence of fraud or concealment on the part of W. Knapp. The only evidence of fraud or concealment presented by plaintiffs is an affidavit of J. Leckey that was prepared for the instant motion wherein she discusses her general lack of knowledge regarding the disbursement of funds from the AmCarb Profit Sharing plan. *See* Pls. App. (Doc. No. 148), Vol.

III, Item O. We agree with defendants that this evidence does not give rise to an inference of fraud or concealment sufficient to toll the statute of limitations. Moreover, the affidavit cannot establish a genuine dispute of material fact because it contradicts J. Leckey's prior deposition testimony that she knew in the late 1980's that W. Knapp was withdrawing funds from the AmCarb Profit Sharing Plan. *See* Defs.' App. (Doc. No.), Vol. II, Tab E, p. 63; *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991) (plaintiff's affidavit contradicting prior deposition testimony does not create a factual dispute barring summary judgment).

Accordingly, defendants' motion for partial summary judgment will be granted as to any claims related to the 1985 withdrawals from the AmCarb Profit Sharing Plan and Trust.

C. *Effective Version of AmCarb Profit Sharing Plan*

Plaintiffs rely on a version of the AmCarb Profit Sharing Plan in this case that contains a joint and survivor annuity provision. *See* Pls.' App. (Doc. No. 141), Vol. I, Item E, Ex. 5. Defendants submitted evidence establishing genuine disputes of material facts as to whether plaintiffs' version of the plan was the one that was properly adopted by the corporation. *See* Defs.' Resp. Br. (Doc. No. 144) at pp. 4-7 (citing to the record). Defendants' evidence indicates that there was never board approval of a version that contained a joint and survivor annuity provision. *Id.*

ERISA preempts contractual language insofar as it is inconsistent with the statutory language. 29 U.S.C. Section 1104 (a) (1) (D). A jury need not decide whether the version of the AmCarb Profit Sharing Plan lawfully adopted contained a joint and survivor annuity requirement, therefore, because the court has already found that the plan was subject to such requirement pursuant to 29 U.S.C. Section 1055(b).

D. *Count Two - Breach of Fiduciary Duty*

Defendants argue that the breach of fiduciary claim cannot be decided on the current record because plaintiffs must prove that W. Knapp acted wilfully or in bad faith. We agree.

"[A] pensioner does not establish a violation of fiduciary duty simply by showing that the administrator did not follow the terms of the plan. If such action is undertaken pursuant to a good faith, albeit erroneous, interpretation, ERISA's fiduciary provisions are not violated. To establish liability, willful or bad faith conduct must be proved." *Burke v. Latrobe Steel Co.*, 775 F.2d 88, 91 (3d Cir. 1985). Also, resolution of issues that involve the parties' intent or state of mind are generally unsuitable for summary judgment. *See Young v. Quinlan*, 960 F.2d 351, 360 n.21 (3d Cir. 1992). A jury will have to make a determination as to whether W. Knapp acted wilfully or in bad faith when making the various withdrawals.

IV. *Plaintiffs' Motion for Summary Judgment With Respect to Pension Plan*

Plaintiffs argue that summary judgment should be granted in their favor with respect to the AmCarb Pension Plan and Trust because it is undisputed that such plan was a defined benefit plan as provided for at 29 U.S.C. Section 1055 (b) (1) (A) and 26 U.S.C. Section 401 (a) (11) (B) (i) .

Plaintiffs submitted evidence which shows that the AmCarb Pension Plan was a defined benefit plan. *See* Pls.' App., Vol. II, Ex. L. Defendants have not responded with any evidence or argument to the contrary. There are no genuine disputes of material fact, therefore, that the AmCarb Pension Plan was a defined benefit subject to the joint and survivor annuity and spousal consent requirements of 29 U.S.C. Section 1055 and 26 U.S.C. Section 401. It is also undisputed that W. Knapp withdrew his balance in the AmCarb Pension Plan of $61,614 without E. Knapp's consent. We find, therefore, that W. Knapp's withdrawal of these funds was in violation of ERISA's joint and survivor annuity requirement.

Accordingly, plaintiffs' motion for summary judgment with respect to the AmCarb Pension Plan will be granted.

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

- Plaintiffs' Motion To Require Intervention Or Suffer Judgment By Default (Doc. No. 139) is **DENIED.**

- Plaintiffs' Renewed Motion For Reconsideration Of Memorandum Order Dated June 5, 2002 (Doc. No. 139) is **DENIED.**

- Plaintiffs' Motion To Strike Claims And Defenses Not Raised In Pretrial Statement Or At The Pretrial (Doc. No. 139) (Doc. No. 139) is **DENIED.**

- Plaintiffs' Motion For Partial Summary Judgment With Respect to Profit Sharing Plan (Doc. No. 139) is **GRANTED** in that the court finds that W. Knapp's benefits held in the AmCarb Profit Sharing Plan were subject to the joint and survivor annuity requirements of 29 U.S.C. Section 1055. The balance of the motion is **DENIED.**

- Defendants' Motion For Partial Summary Judgment (Doc. No. 136) is **GRANTED** as to any claims related to the 1985 withdrawals from the AmCarb Profit Sharing Plan and Trust. The balance of the motion is **DENIED.**

- Plaintiffs' Motion for Summary Judgment With Respect To Pension Plan (Doc. No. 139) is **GRANTED.**

SO ORDERED this 26th day of April, 2004.

/s/ David Stewart Cercone
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 06-2483, 06-3161 & 06-3162

[Filed September 25, 2007]

JANICE B. LECKEY;
JANICE B. LECKEY, Executrix of the Estate of Evelyn O. Knapp, a/k/a Evelyn Olliffe Knapp, Deceased also known as JANICE BURGER LECKEY
Appellant

v.

PAUL W. STEFANO;
FRANK W. JONES,
Administrators of the Estate of William E. Knapp, Deceased, and Trustees of the Insurance Trust of William Knapp, deceased

(D.C. Civil Action No. 95-cv-00108)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, *Circuit Judges*, and ACKERMAN,* *District Judge*

SUR PETITION FOR *EN BANC* REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: September 25, 2007
CRG/cc: William R. Caroselli, Esq.
Edward C. Leckey, Esq.
Kenneth L. Greene, Esq.
Michelle B. Smalling, Esq.
David A. Strassburger, Esq.

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* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation, limited to panel vote only.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 95-108

Excerpts of Deposition of Evelyn O. Knapp [Taken August 18, 1995]

EVELYN O. KNAPP and JANICE B. LECKEY Plaintiff, vs. PAUL W. STEFANO and FRANK W. JONES, Administrators of the Estate of William E. Knapp, Deceased and trustee of the Insurance Trust of William E. Knapp, Deceased, Defendants.	)

EXCERPTS OF DEPOSITION OF EVELYN O. KNAPP

[page 2]

DEPOSITION OF EVELYN O. KNAPP, a Plaintiff herein, called by the Defendant, for examination, taken pursuant to the Pennsylvania Rules of Civil Procedure, by and before Mari P. Weiblinger, a Court Reporter and a notary public in and for the Commonwealth of Pennsylvania, at the law offices of Buchanan Ingersoll, 5800 USX Tower, 600 Grant Street, Pittsburgh, PA, on Friday, August 18, 1995, at 12:45 p.m.

COUNSEL PRESENT:

For the Plaintiff:	Strassburger, McKenna, Gutnick & Potter by Thomas Zwilling, Esq.
For the Defendant:	Buchanan Ingersoll by Karen Crawford, Esq.
Also Present:	Janic B. Leckey Edward Leckey, Esq.

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EVELYN O. KNAPP	
By Mr. Zwilling	3

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- - -

PROCEEDINGS

- - -

EVELYN O. KNAPP, a Plaintiff herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

- - -

BY MR. ZWILLING:

Q. Mrs. Knapp, would you please state your full name ?

A. Evelyn O, middle initial, Knapp, K-n-a-p-p.

Q. And Mrs. Knapp, as you're aware, I'm counsel for the Defendants in this action. I'm going to ask you some questions today. Have you ever been deposed before?

A. Yes. I don't remember, but I know I have been deposed before. Could you speak a little louder? I can't hear you.

Q. I was going to suggest the same thing so the court reporter can hear you. If you don't understand my questions, please ask me to explain it or repeat it.

If you answer a question, I'll assume you

* * * * *

[page 13]

E. Knapp - by Mr. Zwilling

- - -

Satellite was a satellite.

Q. Okay. Do you remember when the Satellite ~~Allied~~ Alloy Corporation and American Metalurgical Products went out of business?

A. Went out of business?

Q. Yes.

A. No, I don't know.

Q. Were you ever involved with the profit sharing pension plans of American Metalurgical Products?

A. No.

Q. How about for Satellite ~~Allied~~ Alloy Corporation?

A. No.

Q. Mrs. Knapp, I'll ask you to look at Exhibit 14 that we marked at Richard Cramer's deposition.

MR. ZWILLING: Do you have this Ms. Crawford?

Q. The first page of Exhibit 14 of Richard Cramer's deposition, is that your signature on that document?

A. Is that what he's referring to? This whole page? This is my signature.

Q. That is your signature?

* * * * *

[page 14]

E. Knapp - by Mr. Zwilling

- - -

A. Uh-huh .

Q. And you signed that in front of the notary public?

A. No. I don't know who that is, and I did not appear in front of her.

Q. You did sign this document?

A. This is my signature.

Q. Who asked you to sign this document?

A. Probably Bill.

Q. Do you remember why?

A. No. He just gave it to me to sign, and I signed it.

Q. Do you recall any documents for either the American Metalurical Products Pension Plan or Satellite ~~Allied~~ Alloy Corporation Pension Plan that

Mr. Knapp may have asked you to sign and you refused?

A. No.

Q. Was Mr. Knapp, basically, in charge of those functions of your married life; the profit sharing plan and the pension plan?

A. Oh, yes.

Q. Did you ask Mr. Knapp what Exhibit 14 of Mr. Cramer's deposition was for?

* * * * *

[page 15]

E. Knapp - by Mr. Zwilling

- - -

A. I don't recall if I did or not. I don't remember any explanation.

Q. Okay. Now, American Carbyde Corporation, you said you worked for the company when its office was at your house?

A. Yes.

Q. Was American Carbyde's office always at your house?

A. No.

Q. Where else was the office located?

A. In the Auld Building.

Q. What building?

A. Auld, A-u-l-d.

Q. Do you know what period of time the American Carbyde Corporation was at the Auld Building?

A. No, I can't really say.

Q. Did you work for American Carbyde Corporation while the offices were at the Auld Building?

A. Yes.

Q. So both at your house and the Auld Building you worked for American Carbyde?

A. Yes.

Q. What did you do for American Carbyde?

* * * * *

[Deposition of Richard Cramer, Exhibit 14, Page 1]

AMERICAN METALLURGICAL PRODUCTS COMPANY, INC. QUALIFIED PLAN TRUST AND SATELLITE ALLOY CORPORATION QUALIFIED PLAN TRUST

ELECTION TO TAKE LUMP-SUM DISTRIBUTION

Name of Participant William E Knapp
Name of Spouse Evelyn O. Knapp

We, the undersigned Participant in the above Plans and his spouse, hereby elect to receive a lump-sum distribution of said Participant's entire Accrued Benefit under all the Plans and Trusts.

We have reviewed and understand the various optional forms of payment under the Plans, including annuity options. We fully understand and agree that by executing this Election both of us are waiving our right to any other payments of any kind under the Plans and Trusts at any future time.

/s/ William E. Knapp	6-26-85
Signature of Plan Participant	Date
/s/Evelyn O. Knapp	6-26-85
Signature of Spouse	Date

Sworn to and subscribed to before me this 26 day of June, 1985.

/s/Gilberta L. Kite

Notary Public

(SEAL)

[stamp] GILBERTA L. KITE
HAMPTON TOWNSHIP, ALLEGHENY COUNTY
MY COMMISSION EXPIRES SEPT. 15, 1988
Member, Pennsylvania Association of Notaries

APPENDIX H

STATUTES AND REGULATIONS

29 U.S.C. § 1055

§ 1055. Requirement of joint and survivor annuity. . . .

(a) Required contents for applicable plans. Each pension to which this section applies shall provide that–

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity. . . .

* * *

(b) Applicable plans.

(1) This section shall apply to–

(A) any defined benefit plan,

(B) any individual account plan which is subject to the funding standards of section 1082 of this title, and

(C) any participant under any other individual account plan unless–

(i) such plan provides that the participant's nonforfeitable accrued benefit . . . is payable in full, on the death of the participant, to the participant's surviving spouse (or, if there is

no surviving spouse or the surviving spouse consents in the manner required under subsection (c)(2), to a designated beneficiary),

(ii) such participant does not elect the payment of benefits in the form of a life annuity, and

(iii) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in subparagraph (A) or (B) or to which this clause applied with respect to the participant.

Clause (iii) of subparagraph (C) shall apply only with respect to the transferred assets (and income therefrom) if the plan separately accounts for such assets and any income therefrom. . . .

* * *

(c) Plans meeting requirements of section

(1) A plan meets the requirements of this section only if–

(A) under the plan, each participant–

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit . . . , and

(ii) if the participant elects a waiver under clause (i), may elect the qualified optional survivor annuity at any time during the applicable election period, and

(iii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirement of paragraphs (2), (3), and (4).

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless–

(A) (i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, ...

* * *

(3)(A) Each plan shall provide to each participant within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary of the Treasury may prescribe) a written explanation of–

(i) the terms and conditions of the qualified joint and survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and (iv) the right to

make, and the effect of, a revocation of an election under paragraph (1).

* * *

26 U.S.C. § 401(a)(11)

§ 401. Qualified pension, profit-sharing, and stock bonus plans

* * *

(11) Requirement of Joint and Survivor Annuity. . . .

(A) In general.–In the case of any plan to which this paragraph applies, except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under this section unless–

(i) in the case of vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity. . . .

* * *

(B) Plans to which paragraph applies.–This paragraph shall apply to–

(i) any defined benefit plan,

(ii) any defined contribution plan which is subject to the funding standards of section 412, and

(iii) any participant under any other defined contribution plan unless–

(I) such plan provides that the participant's nonforfeitable accrued benefit . . . is payable

in full, on the death of the participant, to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under section 417(a)(2), to a designated beneficiary),

(II) such participant does not elect a payment of benefits in the form of a life annuity, and

(III) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in clause (i) or (ii) or to which this clause applied with respect to the participant.

Clause (iii)(III) shall apply only with respect to the transferred assets (and income therefrom) if the plan separately accounts for such assets and any income therefrom.

* * *

26 U.S.C. § 417

§417. Definitions and Special Rules for Purposes of Minimum Survivor Annuity Requirements

(a) Election to Waive Qualified Joint and Survivor Annuity. . . .

(1) In general.–A plan meets the requirements of section 401(a)(11) only if–

(A) under the plan, each participant–

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit . . . , and

(ii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirements of paragraphs (2), (3), and (4) of this subsection.

(2) Spouse must Consent to Election.–Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless–

(A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, ...

* * *

(3) Plan to Provide Written Explanations.–

(A) Explanation of Joint and Survivor Annuity. Each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary may prescribe), a written explanation of–

(i) The terms and conditions of the qualified joint and survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and
(iv) the right to make, and the effect of, a revocation of an election under paragraph (1).

* * *

26 C.F.R. § 1.401(a)-20

§ 1.401(a)-20 Requirements of qualified joint and survivor annuity and qualified preretirement survivor annuity.

* * *

Q-5: How do section 401(a)(11) and 417 apply to transferee plans which are defined contribution plans not subject to section 412?

A-5: (a) Transferee plans. Although the survivor annuity requirements of section 401(a)(11) and 417 generally do not apply to defined contribution plans not subject to section 412, such plans are subject to the survivor annuity requirements to the extent that they are transferee plans with respect to any participant. A defined contribution plan is transferee plan with respect to any participant if the plan is a direct or indirect transferee of any participant's benefits held on or after January 1, 1985, by:

(1) A defined benefit plan,

(2) A defined contribution plan subject to section 412 or

(3) A defined contribution plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 with respect to that participant.

If through a merger, spinoff or other transaction having the effect of a transfer, benefits subject to the survivor annuity requirements of section 401(a)(11) and 417 are held under a plan that is not otherwise subject to such requirements, such benefits will be subject to the survivor annuity requirements even though they are held under such plan. Even i a plan satisfies the survivor annuity requirements, other rules apply to these transactions. See, e.g., section 411(d)(6) and the regulations thereunder. A transfer made before January 1, 1985, and any rollover contribution made at any time, are not transactions that subject the transferee plan to the survivor annuity requirements with respect to a participant. If a plan is a transferee plan with respect to a participant, the survivor annuity requirements do not apply with respect to other plan participants solely because of the transfer. Any plan that would not otherwise be subject to the survivor annuity requirements of section 401(a)(11) and 417 whose benefits are used to offset benefits in a plan subject to such requirements is subject to the survivor annuity requirements with respect to those participants whose benefits are offset. Thus, if a stock bonus or profit-sharing plan offsets benefits under a defined benefit plan, such a plan is subject to the survivor annuity requirements.

* * *

Q-11: Do the survivor annuity requirements apply to benefits derived from both employer and employee contributions?

A-11: Yes. The survivor annuity benefit requirements apply to benefits derived from both employer and employee contributions. Benefits are not required to be paid in the form of a QPSA or QJSA if the participant was vested only in employee contributions at the time of death or distribution and such death distribution occurred before October 22, 1986. All benefits provided under a plan, including benefits attributable to rollover contributions, are subject to the survivor annuity requirements.

* * *

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 06-2483, 06-3161 & 06-3162

[Filed December 21, 2007]

JANICE B. LECKEY;
JANICE B. LECKEY, Executrix of the Estate of Evelyn O. Knapp, a/k/a Evelyn Olliffe Knapp, Deceased also known as JANICE BURGER LECKEY
Appellant

v.

PAUL W. STEFANO;
FRANK W. JONES,
Administrators of the Estate of William E. Knapp, Deceased, and Trustees of the Insurance Trust of William Knapp, deceased

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 95-cv-00108)
District Judge: Honorable David S. Cercone

BEFORE: McKEE and AMBRO, *Circuit Judges*, and ACKERMAN,* *District Judge*

ORDER AMENDING PRECEDENTIAL OPINION

AMBRO, *Circuit Judge*

It is now ordered that the published Opinion in the above case filed August 31, 2007, be amended as follows:

On page 10, in the first sentence of footnote 7, insert "claim" between "§ 1132(a)(1)(B)" and "because" so that the sentence reads:

> In her brief, Leckey appears to abandon her § 1132(a)(1)(B) claim because it would be futile to sue a plan that no longer has any assets.

On page 25, in the sixth line of footnote 10, change "Jun. 6, 2007" to "June 6, 2005" so that the citation reads:

> *Leckey v. Stefano (Leckey II)*, No. 95-108 (W.D. Pa. June 6, 2005), at 4.

On page 26, in the tenth line of the footnote, change "Par. 26" to "Apr. 26" so that the citation reads:

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* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

> *Leckey v. Stefano (Leckey I)*, No. 95-108 (W.D. Pa. Apr. 26, 2004), at 21 (granting in part and denying in part cross-motions for summary judgment).

On page 33, in line 10, change the comma after "*Mass*" to a period so that the citation reads:

> *Mass. Mut. Life Ins. Co.*, 473 U.S. at 147.

On page 33, in the third line from the bottom of the page, delete "(8th Cir.1995)" so that the citation reads:

> *Roth*, 61 F.3d at 603.

On page 38, in the seventh line from the bottom of the page, change "If the plan contain" to "If the plan contained" so that the sentence reads:

> If the plan contained a qualified annuity requirement, William died after illegally removing assets from the Trust, and so the proper remedy for this 29 U.S.C. § 1132(a)(2) violation is to restore those assets.

On page 39, line 8, change "1113(a)" to "1113" so that the citation reads:

> 29 U.S.C. § 1113.

On page 39, lines 11–12, change "29 U.S.C. § 1113(c)" to "*Id.*"

On page 44, lines 1–2, change "the William's estate" to "William's estate" so that the sentence reads:

Here, Leckey alleges that the funds wrongfully withdrawn from the Pension Trust were deposited in a Charles Schwab brokerage account that is currently an asset of William's estate (and thus under the control of the nominal defendants).

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: December 21, 2007
CRG/cc: William R. Caroselli, Esq.
Edward C. Leckey, Esq.
Kenneth L. Greene, Esq.
Michelle B. Smalling, Esq.
David A. Strassburger, Esq.
Harry F. Kunselman, Esq.